The ARBITRATION JOURNAL

VOLUME 5 1950 NUMBER 3

THE ARBITRATION JOURNAL is published quarterly by the American Arbitration Association, Inc.: Wesley A. Sturges, *Chairman of the Board;* Frances Kellor, *First Vice President;* Eugene F. Sitterley, *Assistant Treasurer;* A. Hatvany, *Secretary.* Annual subscription: $3 in the United States, $3.50 elsewhere in the Western Hemisphere; $4 foreign; single copies $1.

Entered as second class matter at the Post Office at New York, N. Y. Printed in the United States.

THE ARBITRATION JOURNAL

VOL. 5 (NEW SERIES) 1950 NUMBER 3

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MEMORIAL

TO A

FRIEND OF ARBITRATION

IN the death of Eugene P. Thomas, an outstanding friend of arbitration has left the scene of action. Not only was he a Director of the American Arbitration Association, a Commissioner of the Inter-American Commercial Arbitration Commission and a member of the Canadian-American Commercial Arbitration Commission, but to him is due in great measure the endorsement and support which the National Foreign Trade Council has given to arbitration during his Presidency of that Council. The advances made in international trade arbitration have been taken with full benefit of his courageous vision and no less courageous action, and in the administration of American tribunals his wise judgment and counsel were constantly sought and always at our command. In the plans for our 25th Anniversary in 1951, in which we had hoped to honor Mr. Thomas for his faithful service to arbitration, we shall deeply miss the charm of his personality and the power of his belief in arbitration.

FRANCES KELLOR, First Vice President
American Arbitration Association

The Effect of State Trading upon Arbitration

Bernard Fensterwald, Jr.*

Assistant to the Legal Advisor, U.S. Department of State

STATE trading is a recurring phenomenon in history. Its current and modern manifestation received its first great impetus during World War I. In the period between the Wars it was strengthened, for example, in Russia by Communism, in Scandinavia by socialism, in Germany and Italy by Fascist autarchy, and in the world generally by the exigencies adopted to combat the world depression.

It was during the Second World War that state trading attained its real stature. All of the combatant, and many of the non-combatant countries engaged in extensive commercial dealings in the name of the sovereign. As in the international law field of contraband, the line between military and civilian items was almost obliterated. It was not possible to compartmentalize war economics; governments were as much concerned with the bulk buying of wheat and potatoes as of rifles and grenades.

Since, due to legal prohibitions or to institutional complexities or to habit, governments are less prone than private merchants to arbitrate commercial disputes, there was an expected diminution in commercial arbitration during World War II. The decrease was not as great as one would expect, though. The huge governmental purchasing agencies of most countries made some use of arbitration clauses in certain of their standard contracts.

Logically state trading should have abated shortly after the conclusion of the struggle. However, because of the enormous economic dislocation caused by the War, governments were unable to return trade entirely to private channels. In the United States, for example, on the domestic front the government's Commodity Credit Corpora-

* The views expressed by the author are entirely his own and do not necessarily represent those of the Department of State.

tion has been engaged in a huge program of bulk buying and selling under the agricultural price support program. Internationally, we have embarked alone or with others upon numerous relief and rehabilitation programs and military and technical aid plans, all of which involve a large amount of governmental buying, selling and financing. The United Kingdom, one of the world's largest traders, has almost completely nationalized large sectors of its international trade.

Space does not permit a country by country analysis of the extent to which state traders engage in arbitration. As the most profitable alternative, we shall divide the generic institution of state trading into several parts, select an outstanding example of each, and study these from the standpoint of their use of arbitration.

State trading runs the whole gamut domestically and/or internationally from (1) a complete 100 per cent governmental monopoly over trade, through (2) a monopoly over certain selected items plus competitive trade in others, to (3) governmental trading on a competitive basis only. The first category is the goal of all Communist governments; a 100 per cent monopoly has been achieved, if at all, only in the U.S.S.R. To the second category belong those countries which have adopted socialistic practices to any great extent. Several Western European states fall within this group but it is probably best typified by Great Britain. The third category includes almost all nations which are not in one of the other two; all governments engage in certain more or less widespread commercial activities. The United States is the most important of these and has been selected for comment for that reason.

The U.S.S.R.

Almost 100 per cent of the commerce within the U.S.S.R. is carried on by corporate and quasi-corporate governmental agencies. A special system of tribunals, called *arbitrazh,* has been established outside the system of private law, with compulsory jurisdiction over all disputes arising between the multitudinous domestic state trading organizations. The *arbitrazh* system is neither a purely judicial nor arbitral one, but it falls much closer to the latter than the former. The nearest Western analogy would be a cross between an administrative and a commercial court. They are presided over by "arbitrators" who must apply requisite legislation, but who are also well trained in the ways of commerce. They must compromise between the application of the substantive law of contracts and the aims of

the very elaborate state plans for commerce and industry. Just prior to the War, the *arbitrazh* tribunals were handling as many as 400,000 cases a year.[1]

In the international trade field, the U.S.S.R. encouraged commercial arbitration in two distinct ways. First, during their early years the Soviets concluded arbitration treaties with a great many countries. Some of these were very limited in scope, dealing only with such matters as the recognition of the validity of arbitration clauses and the enforcement of awards. On the other hand, others, such as the Treaty with Germany in 1925, were all inclusive, detailing the exact manner in which all commercial disputes between German individuals and firms and Russian organizations would be settled by arbitration. The Soviets have continued until the present day to conclude numerous treaties providing for commercial arbitration.[2]

In the early 1930's two things happened which caused the Russians to take another step to advance commercial arbitration: foreign trade was 100 per cent nationalized and, due to the world depression, their world trade position improved. In 1932 they established the Foreign Trade Arbitration Commission.[3] Actually this Commission is only a panel of trained arbitrators, from which arbitrators can be chosen for a particular dispute. It has jurisdiction only when foreign traders and Soviet trading organizations contractually agree that all disputes will be settled according to Soviet law; in such cases, the F.T.A.C.'s jurisdiction is mandatory. Its chief drawback is that it is purely national, purely Soviet. The most persuasive argument in its favor is the alternative thereto. If a foreigner trading in Russia does not submit in advance to the jurisdiction of the F.T.A.C., he can sue and be sued only in the untutored Peoples Courts, which can prove quite disadvantageous, especially if he has property in the U.S.S.R. The F.T.A.C. has not been overwhelmed with work, but

[1] For details of the system see Rashba, "Settlement of Disputes in Commercial Dealings with the Soviet Union", 45 Columbia L.R. 530, especially at 533.

[2] For treaties with Poland and Sweden, see respectively *Arbitration Journal*, N.S., Vol. 1, pp. 390-391 (1946) and Vol. 2, pp. 284-287 (1947).

[3] Collection of Laws, U.S.S.R., 1932, I, No. 48, c. 281; see also Fensterwald, "Sovereign Immunity and Soviet State Trading", 63 HARVARD L.R. 614, 627-634. Rashba, *op. cit.*, at p. 550 said: "It was regarded by the Russians, as they themselves put it, as a sort of legal fulcrum for shifting arbitration from other countries to Soviet Union." For a recent case involving the right of the F.T.A.C. to arbitrate a dispute involving Amtorg see *Amtorg* v. *Camden Fiber Mills Inc.*, 197 Misc. 398, 97 N.Y.S. 2D 556 (1950).

available reports indicate that it is both impartial and efficient.[4]

Great Britain

As elsewhere, state trading in Britain is primarily a result of war scarcities, but in Britain the institution has continued to flourish after the War, due in part at least to the ideological bias of the Socialist Government. The machinery for commercial arbitration is available to the Government. For more than a half century there have been general and special arbitral tribunals to handle disputes in all the various commercial fields. The Crown has the power to arbitrate, unless such power is expressly withheld by Parliament in a particular instance.[5]

As a result of the scarcity of public information, it is difficult to evaluate accurately the extent to which the Government engages in commercial arbitration. However, all indications are that the Government avoids arbitration.[6] In 1947 government agencies bulk purchased 62 per cent of retained imports into the country. These purchases were generally scheduled in long range agreements-treaties-contracts between the United Kingdom and foreign governments; rarely were contracts with private firms concluded. There is no one pattern in the bulk purchase contracts. Those few with the U.S.S.R. and its satellites tend to be short term contracts which were precise in detail. The many with the rest of the world tend to be long term and very loose in such details as price, quantity and delivery date. Usually such terms are expressly left to diplomatic negotiation,[7] where Britain feels that she has a relatively strong hand. Political, rather than judicial or arbitral, settlement of differences is the keynote.

United States

A small percentage of governmental trading has been conducted on the government's behalf by non-corporate officers and agencies.

[4] See Hazard, "Soviet Commercial Arbitration", *International Arbitration Journal*, pp. 8, 17 (1945); Berman, *The Soviet Law of Foreign Trade* (Russian Research Center, Harvard Univ.).

[5] 52 and 53 Vict. c. 49 (1889).

[6] Sir Lynden Macassey said that "the Government, the law and public opinion are mistakenly content to regard arbitration as merely a private mode of determining disputes adopted by two parties to some contract purely for their own personal convenience." *Arbitration Journal*, N.S., Vol. 5, p. 126 at 128 (1950).

[7] For example, see Art. 5 of Canadian Wheat Agreement, Canadian Treaty Series, No. 30, 1946; Art. II (5) of Argentine Agreement, British Treaty Series, No. 46, 1946.

It has been consistently held that they do not have the power to contract for the arbitration of present or future disputes without the express permission of Congress.

This conclusion was reached in 1845 in the case of *United States* v. *Ames* (24 Fed. Cas. 784, C.C. Mass.) on the grounds that it would be repugnant to Article III of the Constitution for a department or agency of the government to vest judicial power anywhere except in an "Article III court". Although this ground for the prohibition has been completely abandoned, new ones have been substituted for it in order to continue the prohibition. Reference is now made to the settled maxim of the law of agency that a general agent, *qua* agent, does not have power to submit a dispute of his principal (in our case, the government) to arbitration, but the agent must have such power specially granted, expressly or by implication. The fact that Congress has, upon occasion, granted such express power[8] can be used to bolster the argument. The United States Arbitration Act (9 U.S.C. 1) has been interpreted as not supplying the requisite power. Despite the fact that the question has never been tested in court, and despite the fact that the foregoing reasons have not conclusively established the necessity of Congressional authorization, their practical result has been that non-corporate federal agencies *have not* resorted to arbitration without an express grant.

Fortunately, from the standpoint of arbitration, most United States state trading has been contracted by corporate government agencies. Such agencies do have the power to refer. During the War the Board of Economic Warfare, which issued directives to such organizations as the R.F.C., the Commodity Credit Corporation, the Rubber Reserve Company, the Defense Supplies Corporation, and the United States Commercial Company, directed that certain limited types of contracts contain a future disputes clause. Although the clause was used only sparingly, the power of such agencies to refer apparently has never been disputed in the courts.

On what grounds can corporate agents refer whereas non-corporate agents cannot? "Since the power to refer is considered a normal part of the general corporate capacity to execute the functions for which the corporation was created, it should accordingly inhere in a Government corporation."[9] This argument can be buttressed by the

[8] For example, see 46 U.S.C. 749 (U.S. Shipping Board); 18 U.S.C. 4124 (Federal Prison Industries); 41 U.S.C. 101, 113 (Contract Settlement Act of 1944); 7 U.S.C. 57a (Cotton Standards Act of 1944).

[9] Note, 49 COLUMBIA L.R. 97, at 102.

fact that almost all government commercial corporations are given the express power to sue and be sued. It is well settled in the fields of both private and municipal corporation law that if such an express power be granted, there is, by implication, a power to agree to arbitrate. There are strong and compelling arguments to carry the analogy over into the field of government corporations.

The fact that government corporations do presently have the undisputed right to arbitrate has not meant, however, that they have made widespread use of the power. The Commodity Credit Corporation, for example, no longer includes future dispute clauses in its contracts. That agency has apparently had only one dispute submitted to arbitration. In summary it might be said that United States state trading agencies generally have the power to refer, but they make relatively little use thereof.

Conclusions

Although there is considerable criticism from both the legal and policy standpoints, the courts of many countries, including the United States and the United Kingdom, hold that state trading firms are immune from civil suit because of their sovereign nature.[10] In these countries individuals and firms who deal with foreign state trading organizations are doubly interested in the arbitral practices of such organizations, since the only alternative to arbitration is judicial settlement in the national courts of the state trader. The advantages of arbitration over judicial settlement in many types of commercial disputes is well known. These advantages apply equally to state traders as to private individuals and firms. However, resort to arbitration should be purely voluntary. It should not be forced upon individuals as a result of the closing of the courts to them in their disputes with state trading firms.

The most general conclusion that one may draw is that it is impossible to generalize on the effect of state trading upon commercial arbitration. It depends on many factors, some of which might be mentioned in summation: the domestic arbitral jurisprudence; the corporate or non-corporate nature of state trading organizations; the overall extent of state trading in a country's economy; and the world trade position and bargaining power of the state trader.

[10] Fensterwald, *op. cit.*, note 3 *supra*.

Labor Arbitration and the Courts

Eugene J. Beneduce

Labor Mediator, New York State Board of Mediation

> "Equity is justice that goes beyond the written law. And it is equitable . . . to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the dicast looks only to the law, and the reason why arbitrators were appointed was that equity might prevail."[1]

THERE has been a recent tendency on the part of the New York courts to expand their jurisdiction to the point where they are encroaching upon the very fundamental principle of arbitration which is that only the arbitrator has the authority to determine the merits of a dispute between the parties to an arbitration agreement.[2]

This intervention by the courts is brought about when a party with whom an arbitration is sought resorts to the courts for an order staying the arbitration or negating the effect of an award, if one has been rendered, on the ground that the arbitration agreement does not cover the particular dispute.[3] Although the Civil Practice Act does not specifically so provide, it appears to be well settled in New York that the courts have the jurisdiction to determine this question.[4]

There can be no quarrel with the courts for assuming this jurisdiction as long as it is carefully exercised. Thus where a union proposed to arbitrate a dispute between the parties concerning a

[1] Aristotle, in "Rhetoric", translated by John Henry Freese. From *The Greek Reader*, edited by Arthur L. Whall (Duell, Sloan & Pearce).

[2] *Matter of Kelly*, 240 N.Y. 74, 147 N.E. 363 (1925); *Matter of Freydberg Bros. Inc.* v. *Corey*, 177 Misc. 560, 31 N.Y.S. 2d 10, aff'd 263 App. Div. 805. 32 N.Y.S. 2d 129 (1941).

[3] N. Y. Civ. Prac. Act., Secs. 1458, 1462.

[4] *Matter of Belding Hemingway Co.*, 295 N.Y. 541, 68 N.E. 2d 681 (1946); *Bullard* v. *Morgan H. Grace Co.*, 240 N.Y. 388, 148 N.E. 559 (1925).

person who had left the company's employ almost six months before the making of the collective bargaining agreement, it appears that the court properly granted the company's motion to stay the arbitration.[5] Similarly, in the case of *Application of Towns and James, Inc.*,[6] the union claimed that there was a dispute with the employer concerning the question of sick leave with pay for an employee of the company, although it conceded, in its affidavit in opposition to the employers' motion for a stay, that there was no clause in the contract providing for sick leave. Here also the court granted the stay of arbitration on the ground that sick leave was not a matter or subject covered by the contract.

While, in each of the above instances, the courts seem to have performed a necessary service, there are many instances where they appear to go beyond this legitimate function. Typical of such cases is one[7] where an employer, in discontinuing a department, laid off some employees and had the work which had formerly been done in that department performed by an independent concern. The union sought arbitration on the question: "Did the employer act improperly in laying off certain of its employees and having the work formerly done by said employees done elsewhere?"

In granting the application for a stay of arbitration, the court referred to a discharge clause of the contract as the only applicable provision and then said: "It is not to be forgotten that normally the determination of business policy resides in management. Management may, if it chooses, restrict its freedom of action in this field, but its intention to yield its inherent prerogatives must be found in the agreement. As I read the agreement it does not encroach on the employer's absolute right exercised in good faith to discontinue a department, though this course may impose loss of positions on the employees affected by the change. I am convinced that the clause dealing with discharges has no relevancy and can not be invoked in the circumstances."[8]

The leading case indicative of the trend of the courts to decide arbitration cases on the merits is the case of *International Association*

[5] *Application of Graphite Metallizing Corp.*, 271 App. Div. 839, 66 N.Y.S. 2d 53 (1946).
[6] 48 N.Y.S. 2d 81 (Sup. Ct., N.Y. County, 1944).
[7] *In re Curry Inc.*, 194 Misc. 527, 528, 86 N.Y.S. 2d 674, 676, 12 LA 290 (1949).
[8] See also *Matter of Berger*, 191 Misc. 1043, 78 N.Y.S. 2d 528, aff'd 274 App. Div. 788, 81 N.Y.S. 2d 195 (1948).

of Machinists v. *Cutler-Hammer*.[9] The contract in this case provided for the arbitration of disputes as to the meaning of "performance, non-performance, or application" of its provisions. The union initiated arbitration proceedings over the interpretation of a clause which stated that the parties agreed "to discuss payment of a bonus", contending that this clause meant that the bonus must be paid and only the amount was open for discussion. On appeal from orders granting the motion to compel arbitration and denying the stay, the court reversed both orders. In so doing the court said: "Unless the contract can possibly mean what the union contends, there is no occasion for arbitration. . . . All the bonus provision meant was that the parties would discuss the payment of a bonus. It did not mean that they had to agree on a bonus or that failing to agree an arbitrator would agree for them. Nor did it mean that a bonus must be paid and only the amount was open for discussion. So clear is this and so untenable any other interpretation that we are obliged to hold that there is no dispute as to the meaning of the bonus provision and no contract to arbitrate the issue tendered."[10]

The precedent established by the *Cutler-Hammer* case was followed by another recent Court of Appeals case.[11] In that case the company had an employees pension plan whereby each employee received pension credits based upon the time for which he was paid by the company. Under a collective bargaining agreement between the parties, the union representatives who spent time in adjusting grievances or negotiating with management were paid by the company only for a maximum of 8 hours—full time beyond this maximum was paid by the union. The union sought arbitration, claiming that the company had violated the anti-discrimination provision of the collective bargaining agreement by failure to afford pension credits for time spent in union activities beyond those hours for which the company had agreed to pay. In confirming the order of the Appellate Division which granted a motion by the company to stay arbitration and denied a cross motion of the union to compel arbitration, the court said: "If there is no real ground of claim the court may refuse to allow arbitration although the alleged dispute may fall within the literal language of the arbitration agreement . . . Neither compensation nor pension credits are given by the company

[9] 271 App. Div. 917, 918, 67 N.Y.S. 2d 317, 318, aff'd without opinion 297 N.Y. 519 (1947).

[10] See also *In re Vasek*, 21 LRRM 2588 (Sup. Ct., N.Y. County, 1947).

[11] *General Electric Co.* v. *United Electrical, Radio & Machine Workers of America*, 300 N.Y. 262, 264, 90 N.E. 181 (1949).

for time spent in union activity beyond the maximum number of hours per week for which the company has agreed to pay. To do so would discriminate in favor of the union representatives. The company has no such obligation. The pension plan is administered on the basis of compensation paid to all of its employees. There is no possible basis for a charge of discrimination, and by that token, no possible ground for arbitration."

Cases involving retirement plans also reflect the trend established by the *Cutler-Hammer* decision. For example, in *General Electric Co.* v. *United Electrical, Radio & Machine Workers of America,*[12] the union sought to arbitrate the question of whether the company had improperly terminated the services of several employees who had been retired at the age of 65 in accordance with the company's policy of compulsorily retiring all employees when they reached this age. In granting the motion by the company to stay arbitration, the court stated: "A reading of the 'national agreement' reveals that it does not even purport to cover the subject of petitioner's right to retire employees . . . The only provisions of the contract dealing with the termination of employees' services are those which relate to lay-offs for lack of work and discharges for disciplinary reasons . . . The evidence submitted on the present motion establishes clearly that the silence of the 'national agreement' on the subject of compulsory retirement at 65 was not inadvertent but deliberate and that the agreement was not intended to include that subject within its scope."[13]

In view of the fact that the principal value of arbitration is the fact that it is a speedy method of resolving labor controversies by arbitrators who are skilled in labor relations, this tendency of the courts to decide cases on their merits is a cause for serious concern. If this trend continues there will soon be a decline of arbitration as a mode of settling labor controversies, which decline would unquestionably be a backward step in the development of the peaceful settlement of labor disputes.

The situation is not impossible, however, if the courts employed a more defined formula to guide them in deciding whether a particular dispute lies within the scope of the agreement. For example, where one of the parties endeavors to arbitrate a question which obviously has no relation to the arbitration agreement, the courts

[12] 196 Misc. 143, 147, 91 N.Y.S. 2d 724, 727 (1949).
[13] See also *American Federation of Grain Millers* v. *Allied Mills, Inc.,* 91 N.Y.S. 2d 732 (Sup. Ct., Erie County, 1949).

might rule that the alleged dispute is not a bona fide one and therefore without the scope of the arbitration agreement. In this category would fit such cases as *Application of Graphite Metallizing Corp.*[14] and *Application of Towns and James, Inc.*[15] Neither of these cases, it will be noted, involved the interpretation of a particular clause. There is some authority for this approach in the case of *Wenger & Company* v. *Propper S. H. Mills,*[16] where the Court of Appeals said: "We have a contract and a refusal to arbitrate under a contract. Unquestionably a claim may be so unconscionable or a defense so frivolous as to justify the court in refusing to order the parties to proceed to arbitration, but where a bona fide dispute in fact arises over the performance of a contract . . . it does not devolve upon the court to say that as a matter of law there is nothing to arbitrate."

Where, however, the alleged dispute refers to a specific clause of a contract, and is not on its face frivolous,[17] the courts should, wherever feasible, avoid interpreting the clause or commenting upon the intent of the parties. A good guide for this principle would be that set forth in the case of *Local Store Employees* v. *Safeway Stores,*[18] where Judge Hofstadter said: "In ascertaining whether a given dispute is one under the contract, it must be borne in mind that, from the very nature of things, specific provision cannot be made in a collective agreement for every detail which may arise in the day to day operations under it. If it covers broadly a given field, the mere failure to foresee every possible contingency should not be treated as a purposeful exclusion of the unforeseen contingency from the operation of the agreement and its arbitration machinery."

It is important to note that the employment of the above formula is not in derogation of the well accepted principle that the parties should not be compelled to arbitrate questions which are outside the scope of the arbitration agreement. The only purpose of the foregoing suggestions is to crystallize the approach of the courts on this subject so that the parties to an arbitration agreement will be reassured that the courts are not negating the purpose of the arbitration provisions of a contract by deciding many cases which, because of their complex nature, should be decided by qualified labor arbitrators.

[14] *Supra,* note 4.
[15] *Supra,* note 5.
[16] 239 N.Y. 199, 202, 203 (1924).
[17] See *Twentieth Century Fox Film Corporation* v. *Screen Publicists's Guild,* 21 LRRM 2400 (Sup. Ct., N.Y. County, 1948), where the court granted a motion by the company to stay the arbitration because the clause the union wanted interpreted specifically permitted the company to do as it did.
[18] 79 N.Y.S. 2d 493, 497 (Sup. Ct., N.Y. County, 1948).

Labor Arbitration in the News

"Flexible and non-legalistic techniques"—have been the kingpin of successful atomic energy labor relations, says Donald B. Straus, executive secretary of the Atomic Energy Labor Relations Panel, in a National Planning Association pamphlet entitled *The Development of a Policy for Industrial Peace in Atomic Energy.* The Panel, recommended by a Presidential commission and composed of William H. Davis, Edwin C. Witte and Aaron Horvitz, was faced with the principal problem of reconciling two objectives of the Atomic Energy Commission: the need for national security and the desire to assimilate the atomic energy industry into the normal business structure as far as possible. Despite the complexity of relationships and interests involved, the Panel succeeded in obtaining the cooperation of labor and management in voluntary and flexible methods, thereby avoiding legislation or Atomic Energy Commission direction. When a party to a dispute feels it has taken every step possible via collective bargaining without effecting a settlement, instead of interrupting production by striking or changing basic working agreements, it first notifies the Panel, giving it a chance to study the situation and recommend a solution. According to Mr. Straus, the "fuzziness" of the procedure outlined was intended to emphasize the voluntary methods of settlement as distinguished from compulsory arbitration. A statement by 26 members of the NPA Committee on the Causes of Industrial Peace Under Collective Bargaining, which accompanies the report, expresses the hope that from the techniques now being employed might evolve concepts and procedures so deeply rooted in the experience of the parties that they will have widespread implications for management and labor in other essential American industries.

"When is a gripe a grievance?"—The distinction became important under a National Labor Relations Board holding that a company, by insisting that union representatives need not be present during the adjustment of a grievance unless requested by the employee, was guilty of refusing to bargain, on the

theory that the contract gave the company's foremen authority to settle grievances finally and the Labor Management Relations Act gave the union the right to be present at any adjustment of a grievance (*Bethlehem Steel Co.*, 89 NLRB No. 33, 25 LRRM 1564). However, the editors of the Research Institute of America's *Labor Report* drew a distinction "between the foreman who can do something about a gripe and minor supervisors who cannot make a decision but merely pass the complaint on to higher-ups," and pointed out that in the latter case the Act does not require that the union be given the opportunity to attend. Although the Board declined to pass upon "the entirely different question of the right of the union to be present" in such cases, it nevertheless distinguished the two types of disputes as follows: "Grievances are usually more than the mere personal dissatisfactions or complaints . . . and their adjustment frequently involves the interpretation and application of the terms of a contract or otherwise affects the terms and conditions of employment not covered by a contract. For this reason, these matters are unquestionably the concern of the bargaining representative . . . (Cox, *Some Aspects of the Labor Management Relations Act*, 61 HARV. L. REV. 274, 320)."

Improved arbitration procedure—continues to increase in importance as a major subject for contract negotiations, and one upon which agreement is heralded as a true victory for both sides. Many recent contracts have included new provisions for accelerating the settlement process. For example, an agreement in a textile plant provides that if a dispute as to workload change remains undetermined for thirty days, the old workload is to apply while management submits the issue to arbitration. Previously, the workload change was to remain effective while arbitration was awaited indefinitely. At General Motors, the parties have appointed an arbitrator to assist their permanent umpire by handling routine cases. The Ford agreement permits the naming of temporary arbitrators if cases pile up before the permanent arbitrator. Still another example is a contract which prohibits the parties from appealing a second grievance until the arbitrator has decided a pending case. And the Brotherhood of Railway Clerks, on behalf of Chicago's Parmalee Transfer System employees, who are not covered by the Railway Labor Act and hence cannot take unsettled grievances to the National Railroad Adjustment Board, concluded a pact which set up new machinery for settling disputes with a three-man arbitration board as the final step.

"Willie Wins a Grievance"—is a filmstrip prepared by the education department of the United States Packinghouse Workers of America (CIO), designed primarily for use in shop stewards' classes. Filmstrips have long been recognized by unions and management alike as one of the simplest, most effective visual education techniques. Starring shop steward "Union Joe," and using the example of a "recalcitrant" foreman for emphasis, the strip instructs stewards on how important it is to get the facts about a grievance, to know the contract provisions so that rights will be enforced, and to meet opposition fairly and firmly. "Willie Wins a Grievance" is another indication that unions are giving more time and attention to training shop stewards in the theory and practice of processing grievances than ever before.

A steward training plan—has been adopted by the Bloomingdales Local of the Distributive Workers Union (Ind.), whereunder shop stewards of the different departments will take turns, in pairs, at joining the staff of the Local for a one-month period. Under the supervision of Local staff members, the trainees will be given intensive instruction in the key phases of administration, including the processing of grievances. It is expected that at the end of the month, the stewards will return to their jobs better equipped to carry out their responsibilities as key figures in the bargaining-representative system. The training program has met with such enthusiastic response from rank and file members that many names have been recommended or volunteered as candidates for future trainees.

Use of settlement techniques for prevention as well as cure—is recommended by Paul Prasow, Assistant Professor of Industrial Relations at the University of Southern California, in an article in a recent issue of *American Business*. Drawing upon his own experience, he says, in part: "In collective bargaining, mediation techniques can effectively prevent conflicts and deadlocks that are often considered inevitable in industrial relations." In the role of an impartial adviser, the mediator can, through regular meetings between company and union over which he would preside, discuss problems of production, costs, competitive bidding and the company's future plans when they affect day-to-day personnel matters, as well as specific grievances. Discussions of grievances in that way become "a valuable educational process rather than merely a battle to prove the

other side wrong. The parties . . . [learn] the advantages of testing the validity of their positions by means of private discussions with the mediator," and the question most frequently raised is: "How would an arbitrator look at this issue?" In the attendant atmosphere of informality, good will and mutual confidence, the parties are able to iron out many of the difficulties which ordinarily would have to be submitted to an arbitral tribunal.

Impartial, privately-administered arbitration——————
was heartily approved by Andrew J. Kaelin, President of Local 234 (Philadelphia) of the Transport Workers Union (CIO). "Many times," he said, "differences between management and the union have been amicably settled and accepted by both sides through the offices of the American Arbitration Association. This board, free from political, financial or business pressures, has been proved capable and protective for all persons involved in these disputes."

Report on world industrial relations,——————
placed before worker, employer and government delegates to the International Labor Organization conference in June 1950, stated, with regard to the effectiveness of existing machinery for conciliation and arbitration: "The fact that the average time-loss rates due to work stoppages over a 20 year period in 22 countries, as shown by a recent survey, was less than .002 of the total working time in those countries, may be taken as an indication of the degree of effectiveness of the existing procedures employed in such countries for the prevention and settlement of industrial disputes." After studying the report, the delegates voted to take final action in 1951 on official recommendations with regard to 1) providing international standards for collective bargaining machinery in collective agreements and 2) setting up international standards for voluntary conciliation and arbitration machinery. They also voted to conduct a study of the law and practice in various countries concerning the termination of individual contracts of employment.

"Concerted national action"——————
was recommended by the International Labor Organization as "perhaps the most important line of international action against mass unemployment." Such concerted action could be promoted "through continuing consultation among governments, aimed at the maintenance of full employment in each country."

Interesting Labor Arbitration Awards

***Offers of settlement**—were not permitted to influence the determination of issues in an arbitration proceeding. At the hearing, the company favored retaining seniority accumulated before the employees involved had been promoted to a job outside the bargaining unit. It had been willing, however, in order to avoid arbitration, to make other arrangements with regard to those employees provided that the union would supplement the collective bargaining agreement by affirmatively setting forth the seniority status of such employees who later return to the bargaining unit. When the union membership failed to ratify the supplemental agreement, settlement talks ended. Referring to the proposed settlement, the union declared: "It simply is not reasonable to suppose that any such proposal would have been made if the company really believed that the present contract means exactly what the suggested supplemental agreement was intended to bring about." The arbitrator replied: "Determination of issues in an arbitration cannot properly be influenced by offers of settlement during negotiation on grievances. Complete freedom of both parties to suggest and reject offers of settlement during grievance meetings is essential and should not be restricted or limited in any way by fear that such action will prejudice the rights of either party should the dispute be submitted to arbitration."

***Illness not related exclusively to old age**—was held not to be a "just cause" for retiring an employee against his wishes. A compulsory retirement program was instituted unilaterally by the company, requiring employees to retire at the end of the month in which they become 65. An employee who turned 65 in August 1947 was permitted to continue working at his request, but when he refused to retire on May 1, 1950, the matter was taken to arbitration. The company claimed that in 1947 he was absent because of illness a total of 20 days; in 1948, 6 days; in 1949, 12 days; and for the first third of 1950, 15 days. The record did not describe the 1947 and 1948

* The proceeding was administered by the American Arbitration Association.

illnesses, but it did show that in 1949 and 1950 he suffered from influenza. The arbitrator said: "Other than the generalization that due to his advanced age . . . [he] is more susceptible to influenza than younger people, there is no claim whatsoever that his absences were occasioned by the illnesses or infirmities that normally accompany advanced years" as distinguished from those which attack young people as well.

"Closely related jobs" were distinguished from "similar jobs" in a dispute arising out of a contract clause which recited that when an opening occurred, a senior employee who "has had previous experience on a closely related job . . . will be deemed to be qualified to learn the job and will be given a reasonable time in which to obtain the necessary proficiency." But "if the employee has had no similar experience, the foreman will determine whether he believes the man can acquire the skill in a reasonable length of time." The job open was that of Inspector, Multi-Duty Filters. The employee qualified for promotion under seniority provisions had been Inspector of Detailed Pieces, in which job he inspected the filters from the beginning of assembly to the point at which they were passed on for final inspection to the Inspector, Multi-Duty Filters. The company had promoted a man whose job was in no way connected with multi-duty filters, arguing that the job of Inspector, Multi-Duty Filters, was "more similar" to his job than to that of Inspector of Detailed Pieces: the first two involved reading blueprints, doing paper work and exercising discretion, and the latter did not. The arbitrator, however, drew a distinction "between a 'closely related job' and a 'similar job.' The helper on a machine may or may not be engaged in work *similar* to that performed by the machine operator, but I doubt that anyone would dispute the fact that the helper's job and the operator's job are closely related." Jobs which are closely related, he said, are "functionally related" and require "close cooperation;" and although jobs may be similar in content and requirements, they are not by that fact alone closely related.

Arbitration clause excluding disputes over "wages"——— did not bar arbitration of a grievance protesting the employer's failure to establish incentive rates for certain jobs. The arbitrator pointed out that the union did not request that a wage rate or even an incentive rate be set; its position was, rather, that the company had undertaken

in a prior contract to install a certain incentive plan covering all jobs, but that rates had thus far been set for only some of the jobs covered. The arbitrator held that such provision continued in effect as an existing working condition under a subsequent contract despite the fact that the new contract did not refer to the plan, since there was no evidence that the parties intended to abandon it. The grievance involved, therefore, an alleged failure to abide by contractual obligations and was not a dispute over wages as such.

Employees promoted to temporary jobs outside bargaining unit could not invoke arbitration under the collective bargaining agreement of a grievance involving overtime pay despite the fact that they remained within the jurisdiction of the union by continuing to have their dues checked off. The arbitrator held that to permit such arbitration would in effect compel the company to adopt the same conditions for permanent as well as for these temporary supervisors, in order to avoid intra-classification inequities, and "this would be tantamount to having the union bargain through the grievance procedure on job conditions in which it has no contractual interest." However, the arbitrator declined to make a broad ruling of non-arbitrability. He said that "the employees on temporary assignment may well be represented by the union, but in a limited way. . . . Thus, if a grievance were to arise involving disciplinary measures imposed on these men or if their seniority rights were in question, the union retains a genuine bargaining interest. . . . The instant grievance, insofar as its merits were disclosed, relates to a question of *conditions on the job assignment,* and since the job is outside the bargaining unit, the grievance must be dismissed as non-arbitrable."

***Signing submission and failing to question arbitrability**——within a reasonable time constituted a waiver of rights under the contract to invoke the time limit within which arbitration was required to be instituted. The contract provided that arbitration could be had if a demand was made within three weeks after the company replied in writing to the grievance. The arbitrator found that the demand in this case was not made within the three-week time limit. However, the company failed to raise the issue of arbitrability before the hearing date on March 17, 1950, although the demand was filed on December 21, 1949 and the submission was signed by its representa-

* The proceeding was administered by the American Arbitration Association.

tive on February 9, 1950. The company was therefore obligated to proceed with the arbitration.

Filing a grievance after expiration of the contract,——— and before the new contract providing for arbitration was signed, did not defeat arbitration. The right to demand arbitration ended with the termination of the contract on December 31, 1949. However, the grievance procedure, which allowed for much more than ten days between the time of filing the grievance and the time the final stage of arbitration was reached, admittedly continued in effect until the new contract was signed. Since the grievance was filed on January 21, 1950, ten days before the new contract came into effect, the demand for arbitration must have been made after the new contract was executed. But even if the demand had been made *before* the new contract came into effect, the grievance would have been arbitrable because "the arbitration clause, as all other provisions of the contract, was given retroactive effect to January 1, 1950, so that the union's right to demand arbitration at any time in January actually was recognized when the parties finally signed the contract." Having determined that he had jurisdiction, the arbitrator then found that although the contract contained no limitation upon the employer's right of discharge, the evidence revealed that the practice of discharging only for cause had been established. In the absence of language indicating an intent to terminate or modify this practice, it was to be maintained.

Dismissed United Nations employees were reinstated——— by the UN Administrative Tribunal rendering its first decision. Declaring that the UN had the right to abolish or vary jobs, the Tribunal declared, however, that it had failed to comply with "fair and equitable procedures" by issuing dismissal notices to "verbatim reporters" and others and then offering them a test for a new "editor verbatim reporter" category, without first examining the possibility of transferring them to other posts.

International Arbitration: A Student Symposium

A COURSE on international arbitration was offered during the Spring semester of 1950 by Martin Domke, International Vice-President of the American Arbitration Association, at the New York University Graduate School of Law. As a requirement of the course, the students, most of whom were practicing attorneys and who came from various parts of the world, submitted papers on some aspects of arbitration pertaining to international economic relations. This symposium offers extracts and digests of some of those papers.

The symposium is presented here as the end product of research, analysis and original thought by students of the subject. It contains interesting information, provocative questions and different points of view. It also illustrates some of the problems which occupy the attention of students who elected to participate in a pioneering course on international arbitration.

Some of the papers are not included because they do not pertain exclusively to international questions or apply only to one country rather than to the international sphere generally. They deal rather with standardized mass contracts, judicial trends in recognition of arbitration, the doctrine of jurisdiction in personam by consent, government arbitration in the United States and the Constitution, arbitration in China, and the recent New York case of *Amtorg Trading Corp.* v. *Camden Fiber Mills, Inc.*, 197 Misc. 398, 94 N. Y. S. 2d 651.[1]

THE NATIONALITY OF THE ARBITRATOR IN INTERNATIONAL COMMERCIAL ARBITRATION

Confidence in the personalities of arbitrators is a chief requirement for successful international commercial arbitration. Although every arbitrator, before entering the hearing room, strives for objectivity

[1] Digested in the *Arbitration Journal*, N.S., Vol. 5, p. 71 (1950).

and impartiality, his own intense national feeling and/or a suspicious move of the "contending" national arbitrator may misguide him to protect "his" cause, which he has to judge, and the harm is done, because the "other" arbitrator will then try to become a still better Lohengrin.

Allegiance to one's state is a foremost civic virtue, but although a national judge's duties toward his state are always as crystal-clear as those of a soldier, the international arbitrator does not administer justice of or for his state, or of or for any state. He is nothing else but a voluntary organ of the community of nations, and, applying over-national justice, would have to profess the same over-national ethos as other international servants.

On which side, if any, is the truth? And how is the modern Solomon expected to discover it? May he decide against his country and for international law? Does he have to abide by the zigzags of his state's foreign or public policies? Will not such problems reduce the willingness of qualified persons to act as international arbitrators? If national prejudices, ideologies, public policies and the like enter the proceedings by the front door in the guise of allegiance of the arbitrator, how can international arbitration succeed?

These questions have not been dealt with in terms of standards for arbitrators. States should therefore proceed now to consider not merely permitting their citizens who serve as international arbitrators to disregard their national allegiance but also to assure to them immunity for acts committed against the credo of national allegiance but for the sake of the higher credo of international justice. Clear borderlines will have to be developed within which the international arbitrator may mete out international justice free of this problem.

ERIC J. HAAS

SOVEREIGN IMMUNITY AND STATE TRADING

State trading—the participation of states in foreign trade through ministers of state, statutory corporations or private persons—has become a dominant factor in 20th Century world trade. International law and practice have long recognized that sovereign states

performing *public* functions were entitled to immunity from suit. However, when immunity was sought to be extended to *commercial* or *"private"* functions not involving the political or governmental powers of the state, conflicts arose and the free flow of commerce was interrupted. Despite confusion, there exists a growing tendency to differentiate between the political-public operations of a state in commercial trading and those acts which are *jure gestionis* (private). The former enjoy immunity while the latter are subject to the jurisdiction of the courts, at least where execution can issue against the property which is the subject of the action or the property of the agency which is a party to the action.

The rule of absolute immunity of states in commercial transactions does not prevail in the majority of national courts; e.g., qualified immunity is observed in Italy, Belgium, Greece, Romania, Switzerland, France, the USSR and Egypt. However, even in many of these nations the property of the foreign sovereign is exempt from seizure and judgments cannot be forcibly executed. Most American courts grant a foreign sovereign's property absolute immunity from seizure, as do the courts of Great Britain, Germany and Italy.

American courts have almost universally denied immunity to corporate agents acting for foreign states but have granted immunity to unincorporated agencies which were integral parts of foreign governments, although this attitude has not been uniform. In Britain, immunity from the jurisdiction of foreign courts can be claimed if the state trader is a government minister, a government department performing functions of the sovereign, or a corporation or other body acting under governmental control or as its agent. If the state trader is a corporation or body acting in its own behalf, it is treated in all respects as a private trader. The law of the forum is to be applied unless the commercial contract makes British law applicable. The Russians rarely claim immunity for their state traders, although they are entirely the creatures and direct representatives of the USSR. Soviet corporations operate on the foreign market in an independent manner and at their own risk, pledging only their own assets.

The principal way of qualifying or removing immunity in commercial transactions on a world scale is arbitration. Adequate arbitration machinery is already established in many important sections of the world and could be set up in areas not yet covered.

In this way, commercial disputes could be adjusted on a voluntary basis, free of the hand of sovereign immunity.

THOMAS RUSSELL JONES

What are the responsibilities of a nation acquiring and possessing property, contracting to become a debtor or creditor and carrying on commerce? As it would thus be acting in the same capacity as a civil or private individual, should a nation therefore be subject to legal proceedings when it includes in its agreement an arbitration clause or should it be permitted to claim that its sovereignty is involved and thus absolve itself from specific performance thereof?

More and more, courts are drawing a distinction between political and other acts of a nation for the purpose of determining its amenability to suit. But the enforcement of the arbitration clause carries with it the corollary of enforcing the arbitral award. In a recent Federal Court case,[2] the Judge referred to the foreign sovereign's possible immunity from suit as a deterrent to a claim by the United States Government as follows: "Repudiation by a foreign sovereign of obligations subject to our domestic law is effective only to the extent that its sovereign immunity shields it from suit. Wherever the shield of sovereign immunity is not available there is nothing to prevent our domestic law from taking its course." Thus it would seem that having obtained an award, one might reduce it to judgment and then proceed against any property of the foreign state which was subject to our domestic law.

MURRAY E. GOTTESMAN

SOVEREIGN IMMUNITY AND THE UNITED NATIONS

An agreement between the United Nations and the United States regarding the establishment of UN headquarters in New York provides for the settlement by arbitration of any dispute arising therefrom which is not settled by negotiation or other agreed method of settlement. It is submitted that this constitutes a binding waiver

[2] *United States* v. *National City* Bank, 90 F. Supp. 448 (D.C.S.D., N.Y., May 5, 1950).

of immunity by the United Nations from proceedings under the jurisdiction of an arbitral tribunal.

The International Court of Justice has found, in a dispute involving reparations for injuries suffered in the service of the United Nations, that the UN is an international person, subject to international law. The International Organization Immunity Act made the Organization and its property and assets immune from suit or process except as immunity was expressly waived by contract or for the purpose of any proceeding. In addition, it proposed that the United Nations be exempt from having to submit to a referee appointed by the International Court of Justice disputes between the UN and the USA over interpretation of the Convention, and that the UN pledge to "make provisions for appropriate modes of settlement" of claims by private parties against the Organization or its agents whenever immunity from suit was invoked. These provisions were substantially incorporated into the Convention on Privileges and Immunities of the United Nations. The net result is that the United Nations, created by member states, is an entity possessing sovereignty together with the right of diplomatic protection and immunity which the traditional view grants a sovereign body. [It should be pointed out, however, that such status did not prevent the UN from using commercial arbitration to settle disputes involving private transactions or law in which it was concerned.]

DANIEL A. LIPSIG

THE ROLE OF THE ARBITRATORS IN FOREIGN EXCHANGE DISPUTES

Since the arbitrator is not required to apply strict legal concepts, he will be concerned only with questions of fact: did either or both parties know of the existence of foreign currency statutes which might play a role in the performance of the contract? Did they take all necessary steps to clarify the legal impediments of the foreign currency restrictions, and did the dispute arise despite these precautions? Is an exporter excused for ignorance of regulations of a country with which he had not dealt before although he could have obtained the necessary information from that country's com-

mercial attaché? Can an importer who agreed to pay in a "hard" currency convince the arbitrator he had "hoped" to obtain the stipulated foreign currency from his national bank in sufficient time?

New and more restrictive currency regulations may be imposed during the time of the merchandise's "captivity," because of sudden, extreme and unforeseen changes in the economic conditions of the importing country. Here, again, the arbitrator should consider the foreign currency angle as a question of fact: he might require the exporter to accept the counter-value in local currency in the agreed-upon amount at the official exchange rate of the importing country, or hold the importer liable to pay at the New York Stock Exchange rate—in any case a hardship, the extent of which depends upon the discrepancy between the official and the free rates (a) for dollars in the exporting country or (b) for currency of the importing country in New York.

American law makes such decisions practically possible, but in countries with "reasoned" decisions (e.g., Holland), the remedy might be found in assessing damages for breach of contract in the payment clause, taking into account the prevailing rate discrepancy. In both cases arbitration offers the practical means of satisfying the winning party without offending any law.

In the case of an unexpectedly imposed foreign currency restriction, the arbitrator will have to find out whether either party has begun to perform the contract in order to determine where the loss should be borne.

Under current practice, a state would not be violating comity by disregarding the currency control law of a foreign state and adjudging subject to attachment the property of citizens of that state which is located in the country in which the proceeding is taking place. Thus, to the extent that this concept applies, an arbitrator may disregard foreign currency restrictions. If and when the Havana Charter takes effect, however, member-states may to a certain degree recognize each other's currency restrictions.

Although foreign currency restrictions may be indispensable at a given time from the point of view of a country's economy, they are immoral, confiscatory and abusive from a higher point of view. In *pari causa* the good arbitrator should try to disregard them or at least to balance their impact upon honest businessmen.

PING LANG CHAO

THE ARBITRATION CLAUSE IN INTERNATIONAL CARTEL AGREEMENTS

The arbitration clause in international cartel agreements serves the purpose not only of avoiding litigation but of enforcing the provisions of the cartel agreement. It has been argued, therefore, that such arbitration clauses are contrary to public policy and a misuse of the privilege of settling controversies by arbitration, inasmuch as they contribute to the growth of organized monopolies nationally and internationally.

But arbitration is merely a means of settling controversies; as such, it does not and cannot accomplish anything affecting the interests of the parties which they themselves could not accomplish by a cartel agreement. Therefore, if the cartel agreement violates the Sherman or Clayton Anti-Trust Acts, the Robinson-Patman Act or other related statutes, the whole agreement must fail if enforcement is sought in the United States. Accordingly, an award rendered in a dispute pertaining to an illegal cartel agreement must be held null and void as a matter of law on the same grounds that any settlement made in violation of the applicable domestic anti-cartel statutes would be void.

HERBERT W. PHILIP

SOME IMPLICATIONS OF INTERNATIONAL TRADE ORGANIZATION ARBITRATION

The ITO Charter provides for an institutional system whereby arbitration facilities and procedures operate within the framework of the Organization. Under these provisions, the Organization is to deal with any dispute likely to arise within the Charter other than those concerning purpose and objectives (Article 1). In other words, all administrative, legal or other questions which may be deemed to contribute to the "nullification or impairment" of any benefit that should accrue to a member from the Charter may receive due consideration by the several methods provided: consultation, arbitration, reference to the executive board, final appeal within the Organi-

zation to the Conference and, finally, judicial review by the International Court of Justice.

Several questions remain unanswered by the Charter, however: Should the arbitrators' decision be final or subject to review by the International Court of Justice? Although it was generally agreed that it should be final, the Charter implies that arbitration thereunder may be subject to court review. The dilemma is, therefore, what is the effect of the binding decision of the Court on an award if the award itself is to be final as in principle it should be?

Another question is whether arbitration may be had immediately or whether the executive board must give its consent. The Charter does not require reference to the executive board as a condition precedent to arbitration provided that the parties agree among themselves.

With respect to state trading, the Charter requires state enterprises to conduct their international business according to commercial principles, and the arbitration provisions constitute a useful adjunct in this regard.

The Charter avoids committing members in advance to a mode of conduct with non-members; however, some arrangement could be worked out under Article 98, Relations with Non-Members. The benefits of the arbitration system which might be evolved from the Charter could be instrumental in encouraging membership in the Organization, and the new set of resulting relationships may well lead to greater economic stability and political solidarity.

ROBERT D. HOPKIRK

ARBITRATION IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

One of the difficulties which emerged after the ICAO Convention was signed arose from the fact that the ICAO Council, although well suited to acting as a legislative body, is not well suited to acting as a judicial body. The Council, to which the disputes must first be submitted, is composed of 21 elected states. As the individuals who serve on the Council are merely representatives of their states, act in the interest of their states and are subject to instruction when casting their votes, there is the danger that a

judicial decision of the Council might be merely a political decision. Such a decision might well lead to appeal either to an ad hoc arbitration tribunal or to the International Court of Justice.

There is also the danger that the Council could become so overburdened with requests from member states for arbitration of disputes which should not be brought to the Council in the first place that it would be unable to perform its other functions.

The United States attempted to solve such problems by entering into bilateral agreements providing for the submission of disputes over traffic practices to the Council only after negotiation has failed. In some of the more recent agreements, tri-partite arbitration machinery was provided for, with the selection of the third arbitrator, if not made by the parties' nominees within three months after delivery of a diplomatic note requesting arbitration, to be made by the President of the ICAO Council from a panel of arbitrators maintained by that Organization. Recourse to such arbitral tribunal would lighten the load of activities of the Council and overcome the possibility of partiality in its decision.

Britain's suggestion calls for a special tribunal identified with the ICAO but not formed from it. Still another solution might be the appointment of ad hoc tribunals with original jurisdiction, in contrast to the Convention's provision for ad hoc tribunals only on appeals from decisions of the Council.

One of the great needs is for regional arbitration tribunals, over which the Council would exert some supervisory powers, to handle disputes within regions. Then the only disputes requiring recourse to the Council would be those between different regions.

JOSEPH F. DOLECKI

The International Civil Aviation Organization should provide a definite set of rules under which international scheduled air transport operations would be conducted between member states, supplanting the maze of special agreements now in existence. Such a multilateral agreement should exist side by side with the permanent Convention and should provide for the use of the arbitral procedure established therein. It is to be hoped that the Rome-Taormina Convention of 1950, although still in the draft stage, will help solve this problem.

VINCENT ESPOSITO

IS AN INTERNATIONAL CONVENTION FOR THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS PRACTICABLE AT PRESENT?

After considering the bilateral, regional and League of Nations treaties and conventions for the enforcement of arbitration agreements and foreign awards, it appears that the wide divergencies between different countries regarding legislation, business practices and the relationship between arbitration and the courts are so great that international arrangements for the enforcement of foreign awards seem impracticable at this time.

The best means today for the promotion of international commercial arbitration appears rather to be bilateral treaties between countries having similar procedural concepts. As between other countries, such treaties should also include rules for arbitral procedure.

Other means of effecting the same end is the development of institutions and administrative agencies throughout the world and the preparation of standard arbitration rules and clauses, with some permanent international agency charged with the duty of fostering international commercial arbitration.

MING CHEN

World Court Opinion on International Arbitration

Kenneth S. Carlston

Professor of Law, University of Illinois

ONE of the established rules in the procedure of domestic arbitration tribunals is that the withdrawal of an arbitrator does not prevent the tribunal from continuing to exercise jurisdiction and completing its task.[1] Is this same principle applicable in the international jurisdiction? Does it apply to a failure to carry out an agreement to arbitrate future disputes as contained in international treaties? These were some of the questions faced by the International Court of Justice in rendering its recent advisory opinion of July 18, 1950, on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania.*

The case arose out of the failure of the governments of Bulgaria, Hungary and Romania to carry out the settlement-of-disputes provisions of the peace treaties of February 10, 1947.[2] In an advisory opinion of the Court on the same general topic, rendered March 30, 1950, the Court ruled, eleven to three, that disputes existed between the United States and the United Kingdom on the one hand, and Bulgaria, Hungary and Romania on the other hand, concerning the asserted denial by the latter to their peoples of the human rights and fundamental freedoms which they had agreed to respect under the peace treaties. The Court accordingly held that those governments were under the duty of carrying out their obligations under the settlement-of-disputes provisions of the treaties.

A period of thirty days was allowed by the General Assembly's resolution referring the request for advisory opinion to the Court,

[1] *Burtlet* v. *Smith,* 2 Barn. K.B. 412, 94 Eng. Rep. 587 (1734); *In re Young and Bulman,* 13 C.B. 623, 627, 138 Eng. Rep. 1344-1345 (1853); *A., T. & S.F. Ry.* v. *Brotherhood of Loc. Firemen & Eng.,* 26 F. 2d 413 (C.C.A. 7th, 1928); *American Eagle Fire Ins. Co.* v. *N.J. Ins. Co.,* 240 N.Y. 398, 148 N.E. 562 (1925).

[2] See Domke, "Settlement-of-Disputes Provisions in Axis Satellite Peace Treaties," 41 AM. J. INT. LAW 911 (1947).

within which, following the opinion of the Court, such governments might perform their treaty obligations by appointing their national commissioners to the arbitration commissions provided for in the treaties. No such appointments were made within the time prescribed and the Court was accordingly asked, under the terms of reference by the General Assembly, to render an advisory opinion on two additional questions: (1) if one party should fail to appoint its representative to the treaty commission where so obligated, is the Secretary-General empowered to appoint the third member of the other party to the dispute; and (2) in the event of an affirmative answer to (1), would a commission so composed, i.e., a representative of one party and a third member appointed by the Secretary-General, be "competent to make a definitive and binding decision in settlement of a dispute?" The Court, in an advisory opinion of July 18, 1950, decided that the Secretary-General was not authorized to appoint the third member of the treaty commission. It noted that it was accordingly not necessary for it to answer the remaining question as to the competence of a tribunal so constituted.

The Court, in making this decision, stood at the crossroads of policy and of law. A negative answer to the questions asked it would create a stalemate in the enforcement of the human rights provisions of the peace treaties. Of even greater importance was the fact that a negative answer would recognize that, despite the establishment of an international community in the United Nations, states still possessed the sovereign power to breach unilaterally their treaty obligations. Finally, a negative answer would affirm the lack of any power in the international community to enforce specifically a treaty obligation to arbitrate future disputes.

On the other hand, the history of the negotiations eventuating in the settlement-of-disputes provisions of the peace treaties, the language of such provisions, and the theory and practice of the process of international arbitration—in short the path of law—led to a negative answer. We may be sure that at least some of the judges joining in the opinion found it difficult to do so. The substantial unanimity of the judges in participating in the Court's opinion testifies, in these circumstances, to both the strength of the legal principles followed by the Court and the strength of the Court itself as a court of law. Assuredly here is ample proof that nations may resort to the Court in the confidence that it will function with even impartiality and as a court of law.

Some international precedent existed which might have been used (or misused) to justify a negative answer. The Presiding Commissioner of the French-Mexican Mixed Claims Commission had sustained the power of a two-member tribunal to render awards in claims which had already been pleaded and after oral arguments were closed, following the withdrawal of the Mexican Commissioner.[3] In this case, however, the two governments concerned did not accept such decisions as binding and resubmitted the claims to a new commission constituted under a newly-drawn convention.[4] A similar holding by Umpire Roberts was made in connection with the withdrawal of the German commissioner and agent from the German-American Mixed Claims Commission.[5] Other analogous precedents could be cited.[6]

It should be remembered, however, that the agreement in the peace treaties to arbitrate future disputes was reached on the part of Russia only with great difficulty.[7] The situation of a failure to agree upon the appointment of a third member was explicitly covered by the treaty provisions but no such safeguards were provided with respect to a failure to appoint a national commissioner. As the Court said: "A Commission consisting of two members is not the kind of commission for which the Treaties have provided. . . . Such a Commission could only decide by unanimity, whereas the dispute clause provides that 'the decision of the majority of the Commission shall be the decision of the Commission and shall be accepted by the parties as definitive and binding'." The Court noted that while under arbitration practice parties very often take care to provide for the consequences of a failure to agree on the appointment of a third member, rarely do they anticipate a refusal by a party to appoint its own commissioner. That no such provision was made in this case "does not justify the Court in exceeding its judicial function on the pretext of remedying default for the occurrence of which the Treaties have made no provision."

[3] *Recueil Général Périodique et Critique des Décisions, Conventions et Lois Relatives au Droit International Public et Privé*, 1936, Pt. 2, p. 11.

[4] Feller, *The Mexican Claims Commissions, 1923-1934*, p. 76 (1935).

[5] Mixed Claims Commission, United States and Germany, *Opinions and Decisions in the Sabotage Cases handed down June 15, 1939, and October 30, 1939*, p. 310.

[6] *Lena Goldfields Co. Arbitration* (1930), Lauterpacht, Annual Digest, 1929-1930, 426; *Colombia* v. *Cauca Co.*, 190 U.S. 524 (1903); but *cf. Irish Free State* case (1924), Lauterpacht, *ibid.*, 1923-1924, p. 360.

[7] *New York Times*, Dec. 6, 1946, p. 1, col. 1; Department of State, *Making the Peace Treaties*, 1941-1947, Department of State Publication 2774, European Series 24, pp. 44, 56 (1947).

In domestic arbitration, Professor Sturges has pointed out, all the members of an arbitral tribunal need to be present in the consideration of a case because of "the right of each of the parties to the counsel and influence of each arbitrator with every other arbitrator on the board upon the whole case."[8] The writer has elsewhere summarized the applicable law in international arbitration:

> "The parties are entitled to a decision emanating from the tribunal designated by them in the *compromis,* in its capacity as a tribunal, not as the personal opinions of its members, joined in by a majority of the arbitrators, rendered after due and joint deliberation, and supported by reason. All these conditions are essential to the validity of the tribunal's decision. . . .
>
> "They, the members of the tribunal, are elected, not as individual arbitrators, but as members of a judicial body. Accordingly, their judgment must be exercised, not in separate solitude, but in joint discussion, debate and deliberation with one another as a single judicial body."[9]

The lack of authority of an international tribunal not constituted in the manner prescribed by the *compromis* applies whether such a "rump tribunal" results from the failure by a state to appoint its member or from the withdrawal by a state of its member from a commission previously constituted. In both instances the lack of authority flows from the lack of consent. It is true that such failure to give consent may at the same time involve a breach of a treaty obligation. The fact of the breach, however, will not cure the defect of lack of jurisdiction.[10] The tragic truth still remains that states still have the power, though not necessarily the right, to breach their treaty obligations.

The Court's opinion is of much value in the development of the process of international arbitration. It settled on a sound basis a point of law which the precedents had left in a somewhat confused state. Its opinion assures states that international arbitration remains a legal process and that when they resort to it for a settlement of their disputes, established legal principles will be respected and applied.

[8] Sturges, *A Treatise on Commercial Arbitrations and Awards,* Section 205 (Missouri, 1930).
[9] Carlston, *The Process of International Arbitration,* pp. 42-43 (1946).
[10] See generally in this connection, Carlston, *op. cit.,* Sections 11-14.

Arbitration in International Agreements

The air transport industry—has been, in the post-World War II era, one of the most forward-looking and rapidly expanding industries. In a field dependent upon harmonious inter-governmental relations, it owes a large measure of its success to the friendly course of dealings which have emerged from provisions for the peaceful settlement of disputes arising out of bilateral air transport agreements. For example, the United States signed its forty-third such agreement on June 13, 1950, with the Government of Israel. Following the pattern set by most of the earlier ones, it provides that disputes as to interpretation and application which cannot be settled by consultation are to be submitted for an advisory report to a tribunal of three arbitrators, one to be named by each party, and the third (who cannot be a national of either party) to be agreed upon by the two so chosen. If the third arbitrator is not named within one month after the first two are appointed, he is to be named by the President of the Council of the International Civil Aviation Organization from an ICAO panel. With regard to enforcement, the executive authorities of the parties are directed to "use their best efforts . . . to put into effect the opinion expressed" in the advisory report. This type of clause is among the most comprehensive, since it not only specifies the method of appointing arbitrators but it also refers to the expenses of the arbitration which, it declares, are to be borne by the parties.

Another and similar type of clause directs the parties to submit disputes as to interpretation and application which are not settled by negotiation to arbitration by the ICAO Council or by any other arbitral tribunal, person or body which the parties may designate. The clause also establishes that the parties "undertake to comply with the decision given." Such clause appears, for example, in the agreements entered into by Portugal with Belgium, Denmark, France, Ireland, Mexico, Norway and Sweden; by Switzerland with Czechoslovakia and the Netherlands; by Sweden with Ireland; and by Great Britain with Greece.

There is a more elaborate clause which goes further than the one mentioned immediately above. It provides that in case the parties

fail to agree upon the composition of an arbitration tribunal and if one has not been constituted within the ICAO, they are to submit their dispute to the International Court of Justice. In addition, the parties not only undertake to comply with the decision, but, interestingly, they agree to impose a penalty—withholding or revoking rights granted by the agreement—upon any party which fails to comply with the decision. This type of clause was embodied in such agreements as those concluded by Pakistan with Australia, Norway, Sweden and the Philippines; by India with Australia and Sweden; and by Great Britain with Ceylon.[1]

Belgian interests in nationalized French industries——— will be compensated for under a "most-favored nation" arrangement. The Convention of February 18, 1949 establishes that should any difficulty arise "in connection with the interpretation or the application" thereof, which could not be settled by negotiation, it "shall be settled by arbitration," with each Government appointing an arbitrator. If the two arbitrators so designated are unable after two months to agree upon a third, "the two Governments shall by common agreement" make the appointment, and, failing this, the appointment shall be made by the President of the International Court of Justice. The arbitration clause declares that the decision of the tribunal shall be final and binding, and is unusual among international conventions in that it sets forth a time limit—six months—within which the award must be rendered.

Polish-Czechoslovakian Social Insurance Agreement——— of April 15, 1948, aimed at "regulating their mutual relations in regard to social insurance in the spirit of the Treaty of Friendship and Mutual Aid," divides the types of disputes which might arise, and establishes different methods of settlement: (a) For difficulties relative to "the carrying out of the present agreement owing to unforeseen circumstances or as a result of changes in legal provisions, the supreme administrative authorities shall reach agreement in regard to the method of applying the provisions of the present agreement." (b) If disputes arise out of the execution of the agreement "or of any supplementary agreement" which might be concluded in accordance with (a), they "shall be settled by mutual agreement between the supreme administrative authorities of the two States."

[1] For other references to arbitration provisions in bilateral air transport agreements, see *Arbitration Journal*, N.S., Vol. 4, pp. 12 and 279 (1949) and Vol. 5, p. 45 (1950).

Danubian navigation disputes are to be settled——— by reference at the request of either party to a conciliation commission, according to the Danube Convention of August 18, 1948 between Bulgaria, Czechoslovakia, Hungary, Romania, the Ukrainian Soviet Socialist Republic, the USSR and Yugoslavia. The commission is to be composed of one representative from each party to the dispute and a third representative appointed by the Chairman of the Danube Commission from among the nationals of a non-party signatory nation. If the Chairman is a national of a disputant party, the third party is to be appointed by the Danube Commission itself. Although the settlement tribunal is referred to only as a "conciliation commission," the Convention nevertheless provides that "the decision of the conciliation commission shall be accepted by the parties to the dispute as final and binding."

Frontier Traffic Agreement between Italy and Yugoslavia,——— concluded February 3, 1949 to facilitate "the exploitation of the properties situated along the Yugoslav-Italian frontier," provides for the amicable settlement of controversies "which may arise in connection with the carrying out of the present agreement . . . by agreement between the competent Yugoslav and Italian authorities."

Minority Commissions for East Bengal, West Bengal and Assam are provided for under the terms of the India-Pakistan Agreement of April 8, 1950, which recognizes the rights of minority peoples in both states. Each Commission is to be composed of one minister of the provincial or state government concerned, who will be the chairman, and one representative each of the majority and minority communities from East Bengal, West Bengal and Assam, chosen by and from among their respective representatives in the provincial or state legislatures. A minister from both India and Pakistan is to be deputized to remain in the areas affected as long as necessary. The purpose of the Commissions is "to observe and to report on the implementation of this Agreement" and "to advise on action to be taken on their recommendations." The Agreement sets in motion machinery for the amicable settlement of disputes by declaring that the Governments of India and Pakistan and the state or provincial governments shall "normally give effect to recommendations that concern them when such recommendations are supported by both central ministers. In the event of disagreement between the two central ministers, the matter shall be referred to the Prime Minister of India

and Pakistan who shall either resolve it themselves or determine the agency and procedure by which it will be resolved."

Treaty of Friendship Between India and Switzerland——— was concluded on August 14, 1948, for the purpose of "consolidating the bonds of peace and friendship which have ever existed between the two States" and "developing peaceful and friendly relations between them." It carries out its objective even in the method set forth for adjusting controversies which may arise out of the interpretation or application of the Treaty: Article VIII directs the parties to enter into a general or special agreement for the arbitration of any such controversies if they remain unsettled by negotiation for a period of six months.

Charges levied by Yemenite Jews,——— to the effect that the Jewish Agency for Palestine has been discriminating against Yemenite Jewish refugees when allocating aid to the various immigrant groups in Israel, should be placed before an impartial board of arbitrators, declared former Representative Joseph Clark Baldwin, who had served as the Administrative Chairman of the Political Action Committee for Palestine: "In the growing pains of this inspiring country things are bound to happen, but they must be solved impartially." He suggested that the board consist of a Christian and a Jew unaffiliated with either party to the dispute but familiar with the country and its problems.

Claims for war damages to tin mines in Thailand,——— instituted by Great Britain and Australia, have been adjusted amicably for five million pounds, which will be paid out of the Kingdom's reserve fund in London. Officials of the Foreign Ministry have expressed confidence that following such settlement of the tin mine claims, other war claims could be settled likewise in the near future.

Greek rice-purchasing contracts,——— negotiated by the Greek Government Foreign Trade Administration in accordance with Economic Cooperation Administration authorization, usually include the following arbitration clause:

> "In case of any claims pertinent to fulfillment of contract, the American Arbitration Association or its designee shall be the Arbitrator and their decision shall be binding and final."

Inter-American Survey on Commercial Arbitration

Jose Brunet

Vice-President, Inter-American Council of Commerce and Production

THE Survey now under way by the Inter-American Council of Commerce and Production on arbitration—its rules of procedure and the degree of its effectiveness in the Western Hemisphere—is by no means the first evidence of interest manifested by the Council in this vitally important subject. On the contrary, the survey signals the beginning of the second stage of an endeavor which dates back to the inception of the Council, when it undertook the task of formulating the principles of international commercial arbitration advocated by businessmen of the Americas. This second stage contemplates the execution of all measures required to achieve the practical application of those principles.

The Survey has been initiated for the purpose of obtaining the most complete information possible on the characteristics of arbitration law in each of the American Republics. This is essential, as it is well known that the principal obstacle to the enforcement of arbitral awards is the dissimilarity among those laws, all of which have estabished different provisions and procedures as *condictio sine qua non* for the confirmation and execution of awards.

The Inter-American Council of Commerce and Production is an organization whose influence and prestige in official as well as private circles make it a most effective instrument of commerce and industry through which its aims may be realized. With a view toward achieving uniformity of national arbitration legislation throughout the Western Hemisphere, it seeks to implement the recommendations on arbitration approved at various of its plenary meetings. Through these recommendations, the Council has continued to lend full support to the efforts of the Inter-American Commercial Arbitration Commission, which was created pursuant to the Resolutions adopted by the Seventh International Conference of American States at Montevideo in 1933.

The further implementation of this endeavor clearly falls within the objectives of trade associations which have always been cognizant that the satisfactory settlement of controversies—which have become more and more numerous as a result of the growth of trade and competition—can be achieved only through the exercise of specialized skill and judgment by persons familiar with the particular field in which the controversy has arisen. Such skill and judgment, when expressed in the form of an arbitration award, should be accompanied by all the guarantees that an established, scientific procedure is able to offer.

The fundamental objective of the questionnaire circulated as the basis of the Survey was to explore the means whereby the arbitration clause of the Inter-American Commercial Arbitration Commission might achieve a maximum of effectiveness. As it is well known, the clause establishes that the parties to a dispute agree to submit it to arbitration under the Rules of the Inter-American Commercial Arbitration Commission, and subject themselves thereby to the jurisdiction of the Commission.

Adherence to the system of the administration of justice through arbitration, which is integrated with the principles promulgated by the Seventh International Conference of American States and with various resolutions of the Inter-American Commercial Arbitration Commission, is expressly manifested in the following recommendations on arbitration adopted by the Inter-American Council of Commerce and Production at its plenary meetings:

1) The adoption of the principles stated in Resolution XLI of the Seventh International Conference of American States and of the Rules of Procedure established by the Inter-American Commercial Arbitration Commission.

2) The use of the arbitration clause of the Commission in contracts entered into and executed in each of the American Republics.

3) The organization of National Arbitration Committees, composed of persons chosen by the Chambers of Commerce and the national branches of the Inter-American Council of Commerce and Production, taking into consideration the different fields of commerce and the diverse regions of each country; and the dissemination of information regarding the use of the arbitration clause.

4) The enactment or amendment of arbitration legislation in such countries where it is necessary, so that the designation of arbitrators by the National Arbitration Committees pursuant to their respective rules shall be valid.

5) The creation in the National Committees of an international section to cooperate with the Inter-American Commercial Arbitration Commission for the purpose of making uniform the procedures involved in international trade arbitration.

6) The placing of emphasis upon the necessity for designating the locale of the arbitration, regardless of whether the transaction is of a purely domestic or an international nature.

7) The support of the presentation and acceptance, at the Ninth International Conference of American States which had already been planned for 1948 in Bogota, of a convention through which the American Republics would recognize the principles of commercial arbitration formulated at the Seventh International Conference, and through which the administration of arbitration would be retained by private agencies.

8) The continuation of efforts in each American Republic to bring about the enactment of legislation necessary to achieving the objective enunciated in the foregoing recommendations and to effecting the complete unification of the arbitration laws of all the American Republics.

Fully aware of the differences in the laws of the Western Hemisphere Republics, and of the fact that the solution lies in uniformity by way of a model law which could be ratified by all of the Governments, the Inter-American Council of Commerce and Production has circulated the questionnaire through its National Committees as a first step toward implementing the recommendations set forth above. The replies by commercial and industrial organizations constitute a firm and invaluable body of information for determining the current status of arbitration in this Hemisphere.

The questionnaire was drawn up with the cooperation of the Inter-American Commercial Arbitration Commission, and its final editing was accomplished with the aid of Dr. Martin Domke's valuable observations. The questionnaire affirms that the Survey proposes to examine not only the procedural and juridical aspects of the problem but also such practical aspects involved in each country as

in the final analysis determine the degree of effectiveness of the institute and delineate the path of future action most likely to achieve success.

When the Survey has been completed, the Council, with the cooperation of the secretariat and of its Committees, will formulate the plan of operation. In this way, arbitration will be included among the aims to which the Council is dedicated, in an unprecedented attempt to submit for consideration by the various Governments the viewpoint of private enterprise on commercial arbitration.

Personally, I have deep confidence in the objectives of a campaign aimed at the effective mobilization of all enlightened business groups interested in utilizing arbitration concepts and procedures in their daily business lives.

The very special position of the Inter-American Council of Commerce and Production as an organization unique in its origin allows it to undertake projects prohibited to other organizations. Utilizing its vast resources, the Council is now undertaking this Survey on arbitration in the firm conviction that it will be an invaluable contribution to the advancement of the knowledge and use of commercial arbitration in the Western Hemisphere.

Brazilian Law and Practice

Tullio Ascarelli and Gaetano Sciascia

LEGAL codes in many countries throughout the world embody detailed provisions for arbitration in the Code of Civil Procedure, dealing thus with arbitration primarily in its procedural aspects. The Brazilian Civil Code of 1917, on the other hand, considers the contract of *compromisso* (i.e., the agreement to arbitrate) among the methods of discharging a debt, following the sections on "accord" *(transaçao)*, whereunder reference is made (art. 1048) to the types of disputes which can be the object of *compromisso*. Following from this, and based on substantive law, the distinction between an arbitrator and a referee is diminished, and, for the same reasons, institutions dealing with the procedural side of the law deal more extensively with limits placed upon its application than with the means of enforcement.

The former Brazilian Code of Commerce of 1850, which was influenced by French tradition, made submission of the following matters to arbitration compulsory: partnership, bills of exchange, promissory notes, commercial credits, contracts for personal service and questions of fact regarding commercial contracts. The Brazilian legislature, however, abolished compulsory arbitration by the *Lei* n. 1350 (1866). Its optional character was reaffirmed in the *Decreto* n. 9263 (1911) and it is now regulated by both the civil and procedural codes.

Summary of the Rules of Arbitration in Brazil[1]

1) The submission agreement may be either judicial or extrajudicial. A judicial agreement is one arrived at in court after the institution of a suit; an extrajudicial agreement may be either a public or a private instrument, signed by the parties and by two witnesses (art. 1038).

[1] References are to the Civil Code unless otherwise specified.

2) The parties must have contractural capacity (art. 1037).

3) The agreement to arbitrate must contain, besides a description of the dispute, the names and addresses of the arbitrators (art. 1039).

4) Anyone who enjoys the confidence of the parties may serve as arbitrator (art. 1043), except incapable or illiterate persons or foreigners (art. 1031 Code of Procedure).

5) There is no provision relating to the number of arbitrators; therefore, if the parties have appointed only two arbitrators and have neither nominated nor authorized the nomination of a third, a difference of opinion between the two arbitrators will terminate the agreement (art. 1042).

6) The arbitrators decide questions of both law and fact, and their award is final and binding; it is not appealable unless otherwise agreed by the parties (art. 1041).

7) But even when the agreement contains a clause denying the right of appeal and reciting a penalty to be paid by the recalcitrant party, an appeal lies as a matter of right if it is contended that the award was rendered after the expiration of the agreement, that the agreement was void, or that the arbitrators exceeded their powers (art. 1046).

8) The judge who would have had jurisdiction over the subject matter of the arbitration is competent to enforce the arbitrators' award *(homologaçao)* (art. 1042 Code of Procedure).

9) In the homologation (i.e., confirmation) procedure the judge has only to ascertain the formal regularity of the award.

10) The award shall only be executed after it has been judicially approved, unless it is rendered by a judge appointed arbiter by the parties (art. 1045).

11) An appeal from a court order confirming the award may be taken to the court of appeal (art. 1046 Code of Procedure).

Despite this complete regulation of arbitration proceedings, Bra-

zilian contract law in the main makes little use of this method of settling disputes. However, it is receiving increasingly widespread acknowledgment and wishes have been expressed that its use be increased as a means of disposing rapidly of law suits.

Existing vs. Future Disputes

Brazilian law courts deny that an agreement to submit future disputes to arbitration is enforceable and bars legal action. Actually, there is no express rule in the Civil Code to that effect, but the Brazilian interpretation is based upon art. 9 of the *Decreto* n. 2900 (1867) which stated, following French doctrine and court decisions, that an arbitration clause which does not name the arbitrators or refers to future actions depends for its validity upon the submission agreement of the parties.

Since it is obligatory that the submission agreement contain, besides a statement of the matter in dispute, the names and addresses of the arbitrators, the Brazilian courts have held that the arbitration clause may not be attacked on the grounds of incompetence of the arbitrators so named. The only remedy for the default of a party to fulfill its obligation to agree to the appointment of the arbitrators is a claim for indemnity; the right to question the arbitrators' jurisdiction is considered related to the *performance* of the arbitration agreement and not to the validity of the agreement itself.

Notwithstanding the aforementioned attitude of courts, partnership agreements in Brazil often contain an arbitration clause which is a flotsam of the old compulsory arbitration provided in the old Brazilian Code of Commerce. The old Code required that partnership agreements indicate "the form of appointment of the arbitrators as judges of debts of the partnership," and although arbitration as described in the Code of Commerce has been abolished and the clause made unenforceable, partnership agreements are still written according to the old rules.

Therefore, if a contract is subject to Brazilian law, the arbitration clause allows a claim for indemnity against the party who does not consent to the appointment of the arbitrators and a claim for payment of the eventual penalty stipulated in the agreement; moreover, a party has no right to refuse to submit to Brazilian jurisdiction.

The Law Governing the Agreement

If a contract is subject to foreign law, it would seem logical from

the above statement to suppose that in Brazil a claim could be made for indemnity and payment of the penalty stipulated for default of performance of the arbitration clause, assuming the clause to be enforceable under the foreign law. However, the procedural effects, namely the stay of an ordinary lawsuit introduced in spite of an arbitration clause, are determined by the law of the forum, although the agreement was executed in a foreign country. Accordingly, for example, evidence adduced in a foreign country will depend for its effect upon the law governing its introduction at the trial.

If the submission agreement itself is concluded in Brazil, it will be enforced if the requisites of Brazilian law (e.g., the nationality of the arbitrators) are observed. When the submission agreement is executed in a foreign country, its form and the effect of substantive law relative to indemnity and penalty should be regulated by the law of the place the agreement was entered into (arts. 210 and 211 of Bustamante's Code). In order to be enforced in Brazil, an agreement concluded in a foreign country must be enforceable under the laws of that foreign country and must comply at the same time with the requirements of Brazilian law.

Enforcement in Foreign Countries of Brazilian Agreements

The question next arises, is it possible for an arbitration agreement entered into in Brazil, covering matters which may be submitted to arbitration under Brazilian law, to provide for arbitration by Brazilian arbitrators but in a foreign country? In that case, the Brazilian citizenship of the parties, as distinguished from that of the arbitrators, would be immaterial. Art. 1042 of the Code of Procedure, which provides that confirmation of the award is within the jurisdiction of the judge who would be competent for the ordinary law suit, induces the same solution as applies to agreements to confer exclusive jurisdiction upon specific courts.

In Brazilian literature, the problem of the validity of agreements to confer exclusive jurisdiction was examined by Haroldo Valladao with his usual skill in the fine work, *Estudos de direito internacional privado* (Rio de Janeiro 1947). He mentions (p. 726) the development of court decisions in favor of the validity of conferring exclusive jurisdiction. Therefore, disputes which might validly be the object of a submission agreement may be submitted to arbitration in a foreign country.

Enforcement of Foreign Awards in Brazil

In Brazil, the *Supremo Tribunal Federal* has the power to enforce foreign judgments (*delibaçao*). Requisites for such execution are a) that the judgment is valid; b) that the foreign tribunal had jurisdiction over the parties; c) that the judgment is a final judgment, complying with the formalities which would be required for execution in the country in which it was rendered; d) that the judgment does not contradict public policy (arts. 15 and 17 *Lei de Introduçao*).

Although the above rule refers to judgments (*sentencias*), the doctrine is believed to apply also to arbitration awards. Although this has not yet been decided by the *Supremo Tribunal Federal,* it appears on the basis of the foregoing that foreign arbitration awards will be enforced by that Tribunal if they meet the same requirements for enforcement as do judgments of foreign courts.

"Essential in every purchase or sales contract"——————— was the way arbitration clauses were described by Philip J. Gomperts, Secretary of the Netherlands Chamber of Commerce in the United States, in a recent issue of *Holland Rebuilds.* "It is discouraging," he said, "how often relationships between European and American firms, who all desire harmonious and prosperous business relations, are broken off as a result of minor conflicts," especially when it is to their financial advantage to invoke arbitration. In addition to the very attractive feature of being inexpensive, commercial arbitration has the further advantage that "when a decision has been reached, the firms involved will be able to continue friendly relations." Recommending the inclusion of an arbitration clause in trade contracts, Mr. Gomperts advised business firms not to "take the law in your own hands, but abide by your arbitration clause and submit your case to us or to the [American] Arbitration Association [with which the Netherlands Chamber "has established strong ties"] before further harm is done." He advised also that in the event "adoption of an arbitration clause . . . has been overlooked, it is still possible to refer a case to arbitration" if the consent of both parties is obtained.

New Aspects of Australian Court Arbitration

Marcel J. Grobtuch

Member of the Department of Economic Research, University of Melbourne, Australia

To the protagonists of court arbitration, the Australian system of referring labor disputes to a special Arbitration Court always presented a good case in debates on court vs. private arbitration. They used to point out the obvious justice of the verdicts, the widespread acceptance of the Court's decisions and a few other advantages of that procedure. Recent events, however, seem to put the case for private arbitration or for some system other than court arbitration in a distinctly more favorable light. These new aspects of court arbitration are by no means restricted to Australia and a brief discussion of them should prove to be of interest to all students of arbitration and labor relations.

In May 1949, a number of Australian trade unions lodged with the Arbitration Court an application for an increase in the basic wage bringing it to £Austr. 10. (At the current official rate of exchange, £Austr. 1 = $2.24.) The entire trade union movement is supporting this demand on the one side, and, although on the other side there is nominally only the metal trade employers, in fact all the employers are concerned and are participating. It is approximately one year since the case was started and some very obvious observations can and must be made.

1) The case is being conducted in a strictly legal manner, which means extensive hearings on every item of evidence submitted by either side. This was found necessary because in the past, higher courts refused to uphold decisions based on "insufficient" hearings of evidence. In practice, this means that although the case, thought to be urgent, has already taken one year, it is nevertheless still in the stage of hearings and few experts believe that it will be finished in the reasonably near future. Extreme pessimists keep talking of

another year or even two. With prices showing a strong upward trend and inflation developing, and with the court's persistent refusal to grant an interim increase, the situation of the employees becomes more and more difficult and they are showing signs of impatience. There is little doubt that at such a time, a speedy decision is absolutely necessary and unreasonable delay cannot be tolerated. The delay affects workers' productivity and the prolonged uncertainty exercises a bad influence on employers' developmental and production plans and on new capital investment.

2) The expenditure involved in such extensive hearings is obviously very high. Both parties had to engage a staff of able lawyers, and large expenses were incurred for economic advice. Three judges have devoted almost all their time to this case and thousands of pages of minutes of the proceedings were printed in numerous copies. All this involves considerable utilization of very scarce manpower, a loss which this short-of-labor country can hardly afford. And still the case is being carried on.

3) The fine legal points and the complex procedure make it very difficult, and sometimes impossible, for the ordinary man and woman to follow and understand the case. A sense of being lost in all the high-sounding arguments and decisions is being experienced by John and Mary Citizen, and this fact does not contribute to increased confidence and faith in the arbitration system. The long delay in fixing the new basic wage, combined with daily price rises, appears to them not an inevitable result of court procedure but rather some sort of conscious postponement of a well-merited award (which, incidentally, is not necessarily true).

4) The situation appears to these people even more cloudy than it is in reality because adequate, free discussion of the subject cannot be arranged as long as "contempt of court" proceedings could be instituted against too fervent critics. This limits eventual criticism of any kind and at the same time prevents the parties from taking any additional steps for the duration of the case since direct action would also mean "contempt of court." The same charge can be preferred against anybody who refuses to disclose his sources of information. A Melbourne University research economist investigating the effects of the introduction of a forty-hour work-week was hard pressed in court to reveal the names of firms which replied to his question-

naire and the details of the replies. It looked as though his refusal would be followed by "contempt of court" charges and he escaped them only at the cost of the court's indication that the value attached to his evidence would suffer. The alternative was either a conviction of this economist or a virtual end of University-conducted impartial research in industrial matters here.

5) The piles of learned evidence have been at times so representative of very advanced economic theories that one can only wonder whether the judges should not rather be professional economists with above-average knowledge of economic theory and history, or learned lawyers. It was difficult to think of persons able successfully to combine advanced knowledge of contemporary economics, statistics, etc., with far-reaching achievements in the legal field, although this is what the judges are expected to do.

6) Publication in the daily press of court proceedings which involve all the heated charges and counter-charges clearly does not have a beneficial effect upon employer-employee relations. There is too often a more or less conscious digging of a deeper gap and some charges may well be remembered long after the case ends.

7) A very interesting point, meriting special study, is the extent to which legal rulings are effective under conditions of full employment and a labor shortage such as Australia is experiencing now. When in the very recent past the Arbitration Court decided to punish the Tramways Employees Association and inflicted upon it the heavy fine of deregistration, it did not advance the end of the tram strike in Melbourne nor did it cause trouble to tram-men in any Australian city (which was a possibility since the ruling was on a Federal basis). In view of strong competition for available manpower, no intelligent employer could think of taking advantage of the court's ruling. It seems as though full employment is further weakening the authority of court arbitration.

* * * *

These are the observations of a few recent developments in the court arbitration field in Australia, and they seem to deserve attention and research on the part of students of arbitration. At the same time, use should be made of them in educating everybody concerned to the true role of court arbitration as a means of settling disputes.

Industrial Conciliation in Britain: Its Compulsory Features*

THE whole structure of British industrial relations is founded on two propositions: first, that the best way to fix terms of employment is by free negotiation between associations of employers and trade unions; and secondly, that the best way to settle differences and disputes is by discussion and agreement between the parties concerned or, failing agreement, by reference to agreed arbitrators.

It was nevertheless clear before the turn of the last century that the Government had a part to play in buttressing and supplementing this voluntary industrial relations structure. By the Conciliation Act of 1896 the Board of Trade was authorized to inquire into disputes and to promote amicable settlements, either by bringing the disputing parties together under an impartial chairman, or by appointing an arbitrator at the request of the parties.

These powers were transferred in 1916 to the newly formed Ministry of Labour and were extended by the Industrial Courts Act, 1919.

Another function which the State has undertaken is to supplement inadequate voluntary industrial relations machinery in poorly organized industries. Various Acts, of which the first was the Trade Boards Act, 1909, and of which the main ones still operative are the Wages Councils Acts, 1945 and 1948, and the Catering Wages Act, 1943, have given the Minister of Labour power to enforce in unorganized industries minimum wages and terms of employment recommended by councils or boards composed of independent persons and representatives of employers and workers.

The Industrial Relations Department consists of a small headquarters staff and staffs of two to six conciliation officers at each of the Ministry's regional offices in England and at the Scottish and Welsh offices. These conciliation offices might be called the field workers of the Industrial Relations Department. They have to make and maintain good contacts with trade union officials and employers in order to get to know as much as possible about human relations

* Reprinted from *Labor and Industry in Britain,* Vol. VIII, No. 1, March 1950.

in the industries in their areas—their conditions of employment, agreements, negotiating procedure and current problems. They also attend meetings of some of the National Joint Industrial Councils of industries predominantly located in their area by arrangement with the Councils concerned.

Disputes and differences are normally resolved by the two sides through the agreed negotiating machinery and in such cases, there would be no interference by the Department. If, however, such machinery does not exist or is exhausted, the conciliation officer will try and help the parties to reach an agreed solution.

If conciliation fails, it may be possible to bring the parties to agree that the dispute be referred to arbitration. Under emergency legislation introduced in 1940 either party may give notice of a dispute to the Minister of Labour, who is required, if it is not otherwise settled, e.g., by conciliation, to refer the dispute to arbitration.

The headquarters officers have national duties roughly similar to those of the regional officers. Some of them specialize in groups of industries, and get to know their industrial relations structure and problems. They maintain close contact with National Joint Industrial Councils and often act as liaison officers. They have, however, various additional duties. They follow reports from the regional officers and, where necessary, offer advice.

The Wages Boards and Councils Branch is responsible for the administration of the Acts relating to the statutory regulation of wages and conditions of employment. This includes the constitution of wages councils or boards, and the enforcement by means of a wage inspectorate of statutory minimum remuneration.

Another branch of the headquarters staff is concerned with the reference of disputes to arbitration. Such reference may be voluntary, i.e., requested by both parties, or it may be the result of a report by one party under the emergency legislation, which is still in operation, in which case the Minister must refer it to arbitration by the National Arbitration Tribunal unless it is otherwise settled.

In some circumstances no agreed settlement is possible by negotiation, conciliation or arbitration, and the Minister of Labour may set up a Court of Inquiry or a Committee of Investigation. These bodies, though not directly related to conciliation and arbitration, nearly always make recommendations which eventually lead to an agreed settlement.

Newspaper Arbitration in 1949

More disputes in the newspaper industry have been settled by arbitration in the past year than in any similar period for more than a decade, according to a report submitted at the 64th annual convention of the American Newspaper Publishers Association by its Special Standing Committee. The Committee, whose function is "to furnish advice and information to ANPA members in their labor relations and to promote amiable agreements between publishers and their employees," termed this fact consonant with "a pronounced trend on the part of newspaper employees in favor of arbitrating wages and other differences not settled in negotiations."

Also in line with this trend is the increase from 166 to 187 in the number of arbitration agreements concluded between ANPA members and their local pressmen's unions. Since many arbitration agreements cover more than one newspaper, this brings the total number of ANPA members protected by the International Arbitration Agreement to 224, twenty-eight above the 1948 figure.

During 1949, the International Arbitration Board sat in six cases, including one which consumed six full days, one of the lengthiest on record with the Special Standing Committee. And twenty-three local negotiations terminated in arbitration proceedings. Although both figures represent an increase over 1948, the Standing Committee pointed out that "numerous settlements, influenced by arbitration commitments, have occurred without necessity for formal hearings." Indeed, in the harmonious atmosphere which has attended the use of efficient and expeditious machinery for settling disputes in their industry, the Chicago office of ANPA and the international officials of several newspaper unions have been in constant communication, and their cooperative efforts have contributed greatly to the solution of many disputes which otherwise would have had to be submitted to arbitration.

The beneficial effect of newspaper arbitration commitments continues to be evident in the maintenance of production and newspaper jobs on the over-all scene. As the Committee itself declared: "Newspaper arbitration increasingly means economic salvation for both publishers and employees."

Arbitration of Workmen's Compensation Claims in Texas

Charles B. Wallace

Attorney, Safety Casualty Company, Dallas, Texas

SOME of these days, in typically impersonal clientese, a lawyer will be asked, "If a man wants to arbitrate a workmen's compensation claim in Texas, can he do it?" Should this lawyer share the author's speculative sally into legal prophecy the querist will be answered in the affirmative. Here may begin, possibly, a new manner of disposing of many of these claims with dispatch, convenience and savings to both claimant and insurance carrier.

Need for Such a Method

During the fiscal year ending August 31, 1947, there were approximately 200,000 accidents to employees in Texas whose employers were covered by workmen's compensation. Of these accidents, 50,000 probably resulted in lost time of one day or longer away from the job. An estimated 42,100 claims on these accidents were filed. The Industrial Accident Board rendered 3,818 awards from which there were notices of appeals filed in 3,578 cases and appeals perfected in nearly all of them. Hundreds of these cases were removed to the Federal Court; as a matter of fact, one district recently had Special Term in one division entirely devoted to them. The average time which elapsed between date of injury and final disposition of the contested claim was at least fourteen months. Insurance carriers spent untold hundreds of thousands of dollars in costs, expenses and attorneys fees in contesting these claims while the usual one-third or less of the award allocated to the claimant's attorneys surely ran into at least a million dollars. Much of this is necessary no matter what method of disposition is used. Some delay is even advisable, as where the exact nature and extent of the injury and disability are then unknown. Where there is good faith but differ-

ences of opinion, arbitration of many claims ought to be employed; otherwise, routine appeals from awards by the Board with nisi prius, de novo trials and grinding appellate procedure must result.

Legal Background

Though based on Massachusetts statutes which provide for arbitration, our workmen's compensation enactments contain no such provision. Section 13 of Article XVI of our Constitution of 1876 provides that the legislature shall pass necessary and proper laws to settle differences by arbitration when the parties elect that method of trial. The legislature passed even as far back as 1846 what are now Articles 224-238 of our Civil Statutes. Article 224 reads:

> "All persons desiring to submit any dispute, or right of action supposed to have accrued to either party, to arbitration, shall have the right so to do in accordance with the provisions of this title."

Article 238 specifically provides that the method there provided shall not be exclusive, so we also still have common law arbitration in addition to statutory arbitration. Section 14 of Article 8306 provides that no employee can waive his rights to compensation. Under Section 12 of Article 8307, where the liability or extent of injury is uncertain the Board may approve any compromise, adjustment, settlement or commutation thereof made between the parties. Our law certainly permits filing a claim with the Board, an award by the Board, notice of appeal filed with the Board, perfecting of an appeal by filing a suit in a court of competent jurisdiction, a trial de novo, and ordinary appeals thereafter through our respective civil appellate courts. Can all this procedure be by-passed with arbitration as the initial and final step? Is such a claim "any dispute or right of action" within Article 224? Is there a public policy favoring this kind of arbitration? Do Articles 224-238 allow such a disposition of this kind of claim under Articles 8306-09? All of these can be answered "Yes."

Argument for Arbitration

There is nothing incompatible about arbitration existing contemporaneously with procedure before administrative boards, nor do we now label arbitration as a kind of turpitude per se. England and Massachusetts and other states have written this method of decision

into workmen's compensation statutes themselves. No case has been found holding that arbitration cannot be utilized under separate and pre-existing statutes. Courts no longer condemn arbitration as ousting the jurisdiction of the courts themselves. Judges now go out of their way to construe liberally arbitration statutes and uphold the awards of the arbitrators. There is no reason to condemn arbitration of compensation claims as an ousting of the preliminary jurisdiction of an administrative board.

As a matter of fact, this is the Golden Age of arbitration, for witness the continual arbitration by employers with thousands of labor unions on every subject from wages to vacations. In an ordinary claim growing out of a collision between two automobiles, the drivers can arbitrate their differences either before or after a suit is filed. No one would deny that an employee could legally arbitrate his claim against the compensation carrier after running the gauntlet of filing the claim, the award, notice of appeal, and perfecting the appeal by filing suit in a court of competent jurisdiction. No real reason exists why such claim for compensation cannot be so arbitrated without running through this needless formality. There is no public policy against arbitration, or this particular kind of arbitration. Our laws clearly would allow it and no provision of our constitution or statutes prohibits it. Our laws should be given such a construction as would favor it. There is no probability of oppression or injustice to the employee as one party to arbitration since there is no expectation that he will be overreached, cheated defrauded.

Arbitration is not a waiver of any right for the employer or employee, but to the contrary, each still insists upon all rights. The function of the arbitration is to decide these rights. There is no element of waiver in a decision which is the result of adversary, arm-length tactics. Arbitration is a quasi-judicial proceeding and its award is tantamount to a judgment.

The only real question is whether or not arbitration in this field would be a compromise, adjustment, settlement or commutation. If so, it would have to be first approved by the Industrial Accident Board, and in the meantime, before approval, the claimant could withdraw. Compromises, even after approval, can be set aside fairly easily. The cases recognize the basic difference between arbitration and compromise and settlement, for the *result* of the first is purely involuntary while the *result* of the latter is wholly voluntary.[1] With statutory arbitration a party cannot withdraw and it is difficult to

[1] 1 C.J.S. 464.

overturn the award.

No additional legislation is needed because our statute plainly says that "any dispute" is the subject of arbitration.

Arbitration of industrial accidents covered by compensation insurance will be no more difficult to handle than fire insurance, wages, personal injuries, etc. Arbitration could never supersede the Industrial Accident Board and the very nature of it could never take the place of compromises and settlements. (Incidentally, the Board itself handled almost 19,000 compromises in the fiscal year ending August 31, 1947.) Arbitration does satisfy the need for final, immediate, inexpensive determination of *differences* between a bona fide claimant and a bona fide insurance carrier. Once the parties wish to arbitrate and decide that they can, the procedure will not be difficult to set up.

The untimely death of Paul N. Turner,—Counsel for Actors' and Chorus Equity Associations and for Associated Actors and Artistes of America, brings to a close thirty-seven proud and impressive years of service. Mr. Turner was a pioneer in charting new paths for those who earn their living in the theater; indeed, while he was Equity's Counsel it never suffered a final legal defeat anywhere, at any time. Maintaining from as far back as the formative years of Equity that arbitration was the best method of settling disputes, he was largely responsible for the inclusion of arbitration provisions in every contract proposal made to managers. In fact, an arbitration clause was part of the very first contract negotiated by Equity as well as of every subsequent contract. Under his distinguished guidance, Equity became the first union to depend upon arbitration for the interpretation of its contracts. His has been a record of which not only Equity but all advocates of harmonious industrial relations can be proud, and one which it will be difficult to equal.

Uniform Contracts and Trade Practice Rules

THE use of uniform contracts between buyer and seller is advocated in many industries. Such contracts frequently include a provision for the settlement of future disputes by arbitration.

Among the groups which provide for arbitration to be administered by the American Arbitration Association are the National Association of Wool Manufacturers, the New York Furniture Warehousemen, the Woolen Jobbers, the National Retail Dry Goods Association, the fur trade and the fourteen leading women's apparel manufacturers associations. The American Institute of Architects has for years provided for arbitration in its standard forms with the option of having it administered by the American Arbitration Association.

The tie fabrics industry is one of the groups which more recently has adopted arbitration as a principal method of settling commercial disputes. One of the trade practice rules proposed by the Federal Trade Commission declares:

> "The industry approves and recommends the use of commercial arbitration for the speedy and efficient disposition of disputes arising out of the sale, processing and distribution of products of the industry."

Other rules recently proposed cover the fine and wrapping paper distributing industry, the venetian blind industry, the slide fastener industry, the wholesale optical industry and the parking meter industry. They all contain a provision identical with or substantially similar to the arbitration provision in the fine and wrapping paper distributors' rules:

> "The industry approves the practice of handling business disputes between members of the industry and their customers and suppliers in a fair and reasonable manner, coupled with a spirit of moderation and good will, and every effort should be made by the disputants themselves to compose their differences. If unable to do so they should, if possible, submit these disputes to impartial arbitration."

French Supreme Court Rejects Triable Issue Doctrine

Ernest H. Mezger

Docteur en Droit, Diplômé de l'Institut de Droit Comparé de l'Université de Paris

In a recent case, the French Supreme Appeal Court (Cour de Cassation) laid down the rules in French law governing the hitherto highly doubtful question of how to proceed if a preliminary dispute arises about the existence, validity or construction of the arbitration agreement and, therefore, about the arbitrator's competence.[1] In order to understand this very important case, it has to be kept in mind that there are two principal means of recourse in French arbitration law: the appeal (art. 1023, Code de Procedure civile) and the opposition to the confirmation of the award.

By the appeal, the whole arbitrated controversy is brought before the court, and the court reviews the award on its merits. The opposition, in contrast, is merely a motion to declare the award null and void (art. 1028, Code Proc. civ.). The parties may waive the right to appeal in their submission or contract (art. 1010, Code Proc. civ.) but, notwithstanding, they have the right to appeal if the award is against public policy or if the arbitrators have prejudiced the rights of any party to reasonable notice, fair hearing, or the other due process requirements, absence of which calls for judicial relief.[2] The right to oppose confirmation cannot be waived in the contract or submission,[3] but may be invoked only for the reasons enumerated in art. 1028, among them lack, nullity, expiration or transgression of the submission.[4]

[1] Court of Cassation, Civil Chamber, Commercial Section, Feb. 22, 1949, Caulliez, Semaine Juridique 1949 II 4899 Note H. Motulsky, Sirey 1949 I 73.

[2] This rule has been established since Court of Cassation, Chamber of Requests, Jan. 7, 1857, Duval, Dalloz 1857 I 406.

[3] This rule has been established since Court of Cassation, Civil Chamber, June 23, 1819, Sirey 1820 I 35.

[4] Court of Cassation, Civil Chamber, Commercial Section, Nov. 10, 1947, Casanova, Semaine Juridique 1947 II 3968 Note Cavarroc, Dalloz 1948, 16, Sirey 1948 I 68.

The facts of the Caulliez case were typical of the conduct of a defendant bent on defying an arbitration agreement. Three brothers, Maurice, Pierre and Edouard Caulliez, had pooled profits and losses flowing from their shares and other participations in different companies, partnerships, etc. The original contract had been supplemented by additional agreements, one of which gave rise to a dispute between Maurice on the one hand and Pierre and Edouard on the other. The original contract contained an arbitration clause to the effect that all difficulties should be settled by arbitrators—*amiables compositeurs*—selected in mutual agreement, or, if no such agreement could be reached, designated by the President of the Commercial Court of T.

Pierre and Edouard summoned Maurice to name an arbitrator, but he refused, contending that the arbitration clause in the original contract did not apply to the additional agreement in issue. Pierre and Edouard then petitioned the President of the Commercial Court to appoint the arbitrators which he did. Maurice opposed the President's order, hoping thus to bring the preliminary issue before the court, but the appointed arbitrators nevertheless rendered an award against him, having first invited all the parties to attend the hearing, having ascertained their own competence and having announced Maurice's default.

Maurice presented a motion for nullity to the Civil Court, alleging misconstruction of the arbitration clause. At the same time, he lodged an appeal from the award in the Appeal Court, predicated upon the alleged violation of the rules of fair hearing by the President of the Commercial Court and especially by the arbitrators, who not only failed to stay the arbitration pending judicial determination of the preliminary issue, but who in addition decided upon their competence and the merits of the case in the absence of the opposing party.

The Civil Court held the opposition ill-founded and Maurice appealed. The Appeal Court had already before it the appeal from the award. Deciding both appeals together, it upheld the decisions of the Civil Court and dismissed the appeal from the award.[5] Maurice made further appeal (Pourvoi en cassation), but it was denied by the Supreme Court.

As only questions of law and not of fact fall within the jurisdiction of the Supreme Court, the true construction of the arbitration clause and its extension to the additional contract could not be

[5] App. Ct. Douai, July 10, 1947, Chronique Sirey 1949, 24.

reviewed except in so far as the Court had to verify whether the trial judge's construction was prima facie sound (exempt from "denaturation," i.e., perversion). This being so, the claim for nullity of the award was bound to fail. The main subject of the Court's decision was the question whether the defendant's rights had not been unduly prejudiced and whether the arbitrators were not guilty of misconduct so that the award was rightly challenged by the appeal. The Court negatived this argument in its opinion, which may be summarized in the following rules:

1) A submission to *amiables compositeurs* in the arbitration clause implies a waiver of the right to appeal (except as mentioned above, for violation of the public policy or of the fundamental rights of defense).

2) The parties may agree that the President of the Civil Court or of the Commercial Court should be requested to appoint an arbitrator or arbitrators or an umpire. Under such a clause, the President has authority to act upon application by either party without even hearing the other.

3) But the appointing order of the President does not preclude the opposing party from challenging the arbitration clause and/or the award.

4) The arbitrators, even those appointed by an order of the President of the Court, have the right and the duty to ascertain the validity of the submission, the regularity of their appointment and their competence under it.

5) They have neither the duty nor even the right to suspend the arbitration without the consent of both parties in order to await the outcome of a trial by court as to the validity or construction of the submission.

6) The defendant is not entitled to claim that he has been aggrieved by the carrying on of the arbitration without his participation. He did not need to default. His appearance would not have deprived him of any of his rights or remedies.

7) The only appropriate method of procedure for the defendant

is to oppose the enforcement of the award by a motion for nullity (art. 1028 Code Proc. civ.) based on the contended lack or nullity or misconstruction of the submission.

These rules call for the following comment:

Ad 1) This rule has been long established,[6] but the Supreme Court had never had the opportunity of laying it down.

Ad 2) This is the first time that this rule was formerly pronounced. (Note that in other countries the right of the parties to entrust a court or president of a court with the designation of arbitrators outside the framework of statutory provisions is questioned.[7]) We think that it may be a consequence of the Court's statutory or customary right to appoint arbitrators even without an agreement to this end, if the method of naming the arbitrators provided for in the submission fails through the neglect or refusal of either party. This right has been admitted by French courts as the only effective enforcement of arbitration clauses.[8] In France the legality of the agreement providing for the designation of the arbitrators by a third person is derived from the right of the parties to give this power to the President.[9]

Ad 3) This point had already been decided on in a former judgment of the Supreme Court.[10] It is of great importance indeed: if the appointment would be tantamount to implied decision as to the validity or construction of the reference to arbitration, the opposing party would have the right to demand a trial at least if he sets

[6] See J. Quartier, *Arbitration Journal,* N.S., Vol. 3, p. 31 (1948); Robert Marx, *ibid.,* N.S., Vol. 2, p. 211 (1947).

[7] See, concerning Swiss law, Dr. Sontag, *ibid.,* N.S., Vol. 3, p. 224 (1948).

[8] Court of Cassation, Civil Chamber, Feb. 27, 1939, Benguigui, Gazette du Palais 1939 I 678; Jan. 22, 1946, L'Alsacienne-Vie, *ibid.,* 1946 I 134. Note that these two cases deny the right of the aggrieved party to waive the arbitration clause and to sue before the courts. As to the judicial appointment under a cause, it was held to be lawful even if made without the petitioner having previously defined the issue by a statement of his contentions and claims: Court of Cassation, Civil Chamber, Commercial Section, Mar. 30, 1949, Sauvignon, Sirey 1949 I 199.

[9] The validity of the reference to the rules of an arbitration organization was highly controversial up to Court of Cassation, Civil Chamber, June 16, 1936, Sté. Costimex, Gazette du Palais 1936 2 524, Dalloz Hebdomadaire, 1936, 457, Sirey 1936 I 310; Nov. 5, 1936, Marot, Gazette du Palais, 1936 II 942; Feb. 26, 1941, Passerieux, Gazette du Palais, 1941 I 573, Sirey 1941 I 53.

[10] Court of Cassation, Civil Chamber, Jan. 9, 1854, Williams, Sirey 1855 I 122.

forth evidentiary facts raising a substantial issue. Moreover, if the third person is not the President but a private individual or organization, e.g., the Court of Arbitration of the International Chamber of Commerce or the American Arbitration Association, the appointment of the arbitrators would have to be considered as a preliminary award, subject to all formalities and recourses of an ordinary award. This is not the law.[11]

It is not certain, however, though it is probable, that the same rule applies to the appointment made by the President when he is petitioned not under a clause but under the above-mentioned legal rule which gives him jurisdiction to name arbitrators upon request of a party aggrieved by the failure of another to perform the arbitration agreement.

Ad 4 and 5) These are the main points of the case: The opinion of the Court is a flat denial of the theses that a preliminary dispute about competence, if substantial, is not an arbitrable issue but rather a triable one, and that the arbitrators are prohibited from proceeding if the defendant brings a lawsuit concerning this question.

More than 100 years ago, a judgment of the Supreme Court had held that the arbitrators were not authorized to decide about their own competence.[12] In that case, a judgment of the Appeal Court in Paris was rightly reversed for having dismissed a motion to set aside the award. The Court of Paris had not even examined the merits of the argument of the opposing party as if it were bound by the arbitrators' jurisdictional findings. Therefore, the observation of the Cour de Cassation as to the power of the arbitrators—now overruled by the Caulliez case—were somewhat obiter.

From the 1842 precedent learned authors and some decisions derived the rule that the continuation of the arbitration proceedings pending a court action as to competence is such misconduct as to render the award challengeable by appeal. This doctrine is dangerous, as it may enable the court to review the case on its merits even though the arbitrators' decision on their competence was found to be correct. The instant case has now well established that this is not law and that in France there is no such thing as a preliminary triable issue or motion for stay of arbitration comparable to sec. 1458, para. 2, New York Civil Practice Act.

[11] Civil Court of the Seine, 5th Section, July 16, 1948, Omnium des Pétroles, Gazette du Palais, 1949 II Summaries, p. 23.
[12] Court of Cassation, Civil Chamber, Aug. 2, 1842, Wattier, Sirey 1842 I 824.

Note that the Supreme Court's opinion is not based on the ground that the opposition to the order of the President (not to be mistaken for the opposition to the award) was not an appropriate means to bring the question before the court. The opinion is intentionally so worded that it becomes clear that the said opposition was useless, as the President had no jurisdiction to pass on the merits of the defendant's plea, but that even a regular action instituted before the Civil Court or before the Commercial Court would not have hindered the arbitrators from going on.

Ad 6) It is the general rule of French law that an appearance under protest is not a waiver or submission.[13]

Ad 7) The opposition by motion for nullity of the award ensures the ultimate power of the court to check the existence, validity and construction of the arbitration clause. This remedy stops the enforcement of the award.[14] However, the "suspensive" effect may be reduced to nothing by the arbitrators' ruling that the award is "executory by provision."[15] According to a recent judgment of the Court of Appeal of Paris,[16] there is no remedy against such an order of *amiables compositeurs*. This state of the law is surely not satisfactory, though better than the lack of a remedy against the suspensive effect of the opposition. The Court of Paris allows the motion to vacate to be filed previous to the confirmation of the award,[17] and therefore and for other reasons, up to this day, no serious hardships have made themselves felt.

[13] The same rule prevails in American law; see *Diener* v. *Goldsmith*, N.Y.L.J., Jan. 21, 1948, *Arbitration Journal*, N.S., Vol. 3, p. 57 (1948). But the appearance without protest is a waiver, Court of Cassation, Chamber of Requests, Apr. 20, 1931, Staehle, Sirey 1931 I 245.

[14] Court of Cassation, Civil Chamber, Oct. 28, 1938, Gazette du Palais, 1938 II 804, Dalloz Hebdomadaire, 1939, 2, Sirey 1938 I 351; Chamber of Requests, July 29, 1941, Gazette du Palais, 1941 II 252; Civil Chamber, June 9, 1947, Sirey 1947 I 196, Gazette du Palais, 1947 II 130; Civil Chamber, Commercial Section, Jan. 10, 1949, De Labroue, Gazette du Palais, Apr. 5, 1949.

[15] Court of Cassation, Civil Chamber, Commercial Section, Apr. 12, 1948, Fenouillet, Gazette du Palais, 1948 I 244, Dalloz, 1948, 325, Sirey 1948 I 96.

[16] App. Ct. Paris, June 18, 1948, Sté. Le Parisien Libéré, Dalloz 1948, 44, Sirey 1949 II 17, Note J. Robert.

[17] App. Ct. Paris, Oct. 30, 1936, Simpere, Sirey 1937 II 66. The opposite view prevailed in the Omnium case (*supra*, Note 11) but for special reasons.

Review of Court Decisions

THIS review covers decisions in civil, commercial and labor-management cases. They are arranged under the main headings of: I. *The Arbitration Clause in Contracts,* II. *Enforcement of Arbitration Agreements,* III. *The Arbitrator,* IV. *Arbitration Proceedings,* and V. *The Award.*

I. THE ARBITRATION CLAUSE IN CONTRACTS

The term "just cause" limiting the right to discharge employees is "in no way vague, indeterminate or indefinite" but "means a breach of contract of employment by the employee." Therefore, if the employer breached the contract by discharging without "just cause" it cannot be compelled to reinstate the employee; moreover, an offer to reinstate would not discharge the employer from liability for such breach. The contract made no provision for redress; therefore, neither reinstatement nor payment of damages was within the jurisdiction of the arbitrator, and that portion of his award was vacated. But the discharged employee's mere placing of his hands upon the shoulder of a female employee, in public and in the spirit of cameraderie, presented an issue of fact as to whether or not such conduct constituted a just cause for discharge. As the arbitrator had decided it did not, the matter was "authoritatively settled" and the trial court's judgment for damages resulting from the company's breach of contract was, accordingly, affirmed. *Lone Star Cotton Mills* v. *Thomas,* 227 South Western Reporter, 2d Series 300 (Court of Civil Appeals of Texas, El Paso).

Lack of good faith in demanding sale and dissolution of corporation was an issue for the determination of the arbitrators, under a standard American Arbitration Association arbitration clause covering any controversy or claim arising out of or in relation to the contract or any breach thereof. Accordingly, the Appellate Division granted a stay of the dissolution proceedings and denied a stay of arbitration. The Court of Appeals affirmed. *Zybert* v. *Dab,* 301 N.Y. 632.

Dissolution of corporation and resulting lock-out of employees did not give rise to an arbitrable issue. "In order to constitute actionable bad faith" the employer would have had to agree not to dissolve its corporate existence for the duration of the contract or to assume some other obligation that survived dissolution. The collective bargaining agreement, however, contained

no such provisions. The legal effect of filing a certificate of dissolution was a question for the court in determining whether an arbitrable issue existed. Although since a corporation is deemed to continue in existence for the purpose of suit, it might also be deemed to continue for the purpose of arbitration, "this would not be sufficient to require the corporation to proceed to arbitration in the absence of an arbitrable dispute." *Kossoff* v. *Jones (Local 155, International Ladies Garment Workers Union)*, 276 App. Div. 621, 96 N.Y.S. 2d 689.

Dispute arising out of wage reopening provision was held not arbitrable because the wage reopening provision, which permitted either party to "request the other party to negotiate for a revision of the wages," obligated neither employer nor union to agree on a wage revision and "the arbitration clause does not express their intention to allow an arbitrator to agree for them when they are unable themselves to come to terms." Moreover, the fact that the employer participated in an arbitration of a similar dispute the year before and consented to the award—all without raising the issue of arbitrability—did not constitute a waiver of its right to contest the arbitrability of a subsequent wage revision dispute. That single incident "hardly bespeaks the adoption of a deliberate or settled policy." *Towns & James, Inc.* v. *Barasch*, 96 N.Y.S. 2d 32, aff'd 277 App. Div. 857.

Express limitation upon the scope of the arbitration clause to an extension of the period of time during which the children should remain with their father was binding, and an order directing arbitration of a dispute over reduction of the father's support payments and cancellation of arrearages was reversed by the Appellate Division. *Matsner* v. *Fried*, 96 N.Y.S. 2d 584.

Claim for damages against an agent for breach of warranty of authority arose from the agent's warranty implied in law and not from the contract itself. Hence such claim was held not arbitrable. *H. L. C. Bendiks, Inc.* v. *Frank & Moloney, Inc.*, 95 N.Y.S. 2d 533.

II. ENFORCEMENT OF ARBITRATION AGREEMENTS

Service by registered mail upon a non-resident was held valid. A Massachusetts corporation appearing specially to vacate such service of the notice of arbitration was permitted also to challenge the efficacy of the arbitration clause, since it was the sole basis upon which jurisdiction could be sustained. The clause provided for arbitration in New York under the Rules of the National Federation of Textiles, and since Rules 3 and 25 recite consent to such service, the court held that acceptance of the clause defeated the petition. Turning next to the attack upon the constitutionality of sec. 1450 Civil Practice Act, by which a contract to submit disputes to arbitration in New York is enforceable against a non-resident, the court said that the parties to such a contract submit to the law and courts of that jurisdiction and "to any procedures in that jurisdiction necessary to bring the arbitration to an effective conclusion. The law merely gives fuller expression to what the parties them-

selves fairly intended. So viewed, the agreement is in truth a consent to the jurisdiction of our courts," and there is no compulsion involved which might be contrary to constitutional guarantees. *Liberty Country Wear, Inc.* v. *Riordan Fabrics Co., Inc.*, 197 Misc. 581, 96 N.Y.S. 2d 134.

Question of law was held a proper subject for arbitration, despite language which read that arbitrators' "conclusions of law shall be subject to correction by the Court." The Pennsylvania Arbitration Act of 1927 provides court review of an award which "is against the law, and is such that had it been a verdict of the jury the court would have entered different or other judgment notwithstanding the verdict. The court may modify and correct the award or resubmit the matter to the arbitrators." The court held that "the implication of the section quoted is that the arbitrators shall pass upon questions of law as well as upon questions of fact." Indeed the Arbitration Act "would become of doubtful workability if we should hold that it is inapplicable to questions of law . . . for it is sometimes difficult to determine whether certain disputes are questions of law or fact or both." *Shannon* v. *Pennsylvania Edison Co.*, 72 Atlantic 2d 564 (Supreme Court of Pennsylvania).

Stay of court action pending arbitration "is, in effect, an injunction," and an order granting the stay was therefore appealable. Since there was no claimed breach of the contract, appellants could not invoke the provision for "injunctive relief to prevent irreparable injury," and since the dispute fell within the arbitration clause, appellants could not prevent the arbitration pending decision on a motion for a declaratory judgment interpreting specific terms of the contract and the rights of the parties thereunder. *Hudson Lumber Co.* v. *United States Plywood Corporation*, 181 F. 2d 929 (Court of Appeals, 9th Circuit).

Grievance which was not "reduced to writing" in compliance with such express requirement of the arbitration agreement therefore never set the grievance procedure in motion. Accordingly, the Circuit Court of Appeals, 2nd Circuit, denied a stay of the court proceedings pending arbitration. *Barone* v. *Schick, Inc.*, 181 F. 2d 47.

Common law arbitration agreement was held "subject to construction under the same rules normally applied to the construction of contracts." *Wagoner* v. *City of Hutchinson*, 216 Pacific 2d 808 (Supreme Court of Kansas).

Award rendered in favor of an assignee was held not to have been barred by the assignment of the contract after its breach. The decision of the lower court (see *Arbitration Journal*, N.S., Vol. 5, p. 150) was upheld by the Appellate Division. *Packard Fabrics, Inc.* v. *Deering Milliken & Co., Inc.*, 277 App. Div. 753, 96 N.Y.S. 2d 878.

Arbitration clause on reverse side of contract is binding if it is referred to and incorporated by reference in a clause on the face of the contract, above the signature. *Liberty Country Wear, Inc.* v. *Riordan Fabrics Co., Inc.*, 197 Misc. 581, 96 N.Y.S. 2d 134.

The arbitration clause in a basic agreement, governing the relationships between members of the two organizations which were parties thereto, recited: "It is the intention of these regulations that all disputes between AGVA and ARA with reference to this agreement and regulations and their interpretation or any breach or alleged breach thereof, as well as all disputes and controversies between members" shall be submitted to arbitration. The court held this language "sufficiently broad to include *any* controversy between members of the respective organizations, whether it arises directly from an agency agreement [admittedly cancelled by the agreement sued upon which contains no arbitration clause] or, as in this case, indirectly." *Application of Chakrin,* 97 N.Y.S. 2d 258.

Existence of a bona fide dispute was held a question of law, since the collective bargaining agreement did not prevent the employer from abolishing either of two departments or from interchanging the work between them, but rather provided for a transfer of employees into another departmental seniority unit when work was not available. The employer therefore had the right in the regular course of operations to have available work of one departmental seniority unit performed by employees of another seniority unit. Having thus decided that no bona fide dispute existed, the court stayed the arbitration proceedings. *Carborundum Co.* v. *Wagner (United Chemical Workers, C.I.O.),* 96 N.Y.S. 2d 278, aff'd 277 App. Div. 942, 98 N.Y.S. 2d 774.

III. THE ARBITRATOR

Agreement contemplating naming of arbitrators at time of execution and expressly limiting the arbitration "to arbitrators hereinafter designated," which did not in fact contain the names of the arbitrators was held "a nullity." Moreover, since it also failed to provide a method for the appointment of arbitrators *in futuro,* sec. 1452 of the Civil Practice Act (directing the court to appoint an arbitrator under certain circumstances if the parties failed to do so) cannot be invoked. *Somerset Holding Corp.* v. *Taub,* 276 App. Div. 864. (For lower court decision, see *Arbitration Journal,* N.S., Vol. 5, p. 71.)

"A circumstance tending to bias" the arbitrator disqualifies him, and his award will be vacated. A master agreement between the trade association and the union provided for arbitration. In the course of such a proceeding between a company member which had withdrawn from the association and the union, after hearings were closed but before the award was rendered, the union proceeded to negotiate with the arbitrator for his appointment as impartial chairman in the industry. When informed of this, the company requested the arbitrator to disqualify himself, but he rendered his award. The court, in vacating the award, declared that it was "unnecessary" to show that it had "actually resulted from prejudice," and quoted from *Matter of Friedman,* 215 App. Div. 130: "Every litigant is not only entitled to present his claims to an impartial judge, but to one who by no act on his part has justified a doubt as to his impartiality." *Application of Steuben,* 97 N.Y.S. 2d 613.

Arbitrator employed by attorney for a party, to do machine repairing work in a lumbering operation in which the attorney was engaged, was not disqualified; the rule that "proof of business relations between parties and arbitrators, standing alone, is not sufficient to vitiate an award" is applicable to a party's attorney as well as to a party. Moreover, "the presumption is that the arbitrators did their duty;" since convincing evidence establishing misconduct was not adduced, the award was upheld. *Shapiro* v. *Gordon,* 197 Misc. 241, 97 N.Y.S. 2d 644, aff'd 98 N. Y. S. 2d 451.

IV. ARBITRATION PROCEEDINGS

Stenotype notes taken at an arbitration proceeding, containing testimony bearing on questions of tax liability of a taxpayer under investigation by the Bureau of Internal Revenue, were required to be produced by the stenotypist, notwithstanding the fact that the notes were not related to any books of account. The statutory provision that any person "having knowledge in the premises" may be required to attend when summoned "obviously . . . does not relate only to books of account," said the court, but relates generally to the tax investigation which is being conducted by government officials. Thus if testimony was elicited during the arbitration proceedings relative to the taxpayer's income, the Commissioner has the right under the statute "to obtain that information either by subpoenaing the stenotype records or by summoning persons who may have heard the taxpayer make such admissions." *Stone* v. *Frandle,* 89 F. Supp. 222 (U. S. District Court, D. Minnesota, 4th Div.).

Failure to reduce to writing testimony taken at the hearing would not disturb the award in the absence of an express provision in the arbitration agreement making that a requirement. Furthermore, since neither the statute nor the agreement required that witnesses be sworn, the objecting party who was present and remained silent when testimony was given by witnesses who were not sworn was estopped from raising such objections on a motion to confirm the award. *Shapiro* v. *Gordon,* 197 Misc. 241, 97 N.Y.S. 2d 644, aff'd 98 N.Y.S. 2d 451.

V. THE AWARD

An incomplete award and a second award rendered without authority were both vacated. An award was rendered on February 26, 1949, in a discharge case, directing that the employee be demoted without pay, reclassified and "given such employment by the company which he is competent and capable of doing." In response to a protest by the union representative, a second award was rendered on March 21, 1949, modifying the first award by specifying the new job to which the employee should be demoted, and by directing the payment of wages retroactive to the date of discharge. The court held the first award incomplete since it left the question of the new

position for determination wholly by the employer in the future. The second award was vacated because the arbitrators acted without authority, having already rendered a final award (although an incomplete and thus an invalid one). *Oil Workers International Union, CIO* v. *Mercury Oil Refining Co.*, 89 Fed. Supp. 702 (U.S. District Court, W.D., Oklahoma).

Court declined to pass upon the wisdom, fairness or justice of an award of the umpire appointed to settle disputes between the City of Cleveland and employees of the City Transit System, in a suit to enjoin a strike by such employees. The court viewed the disputes-settlement machinery as "entirely voluntary," and said that "if it is to be effective, the decision of the umpire in any case must be accepted by both sides. There must be mutuality in this respect," or the machinery "will break down." However, if there is dissatisfaction with a decision, it is not the function of the court in litigation to review it but, rather, it is a matter that must be taken back to the umpire. The court, in interpreting the law, merely found that public employees did not possess the right to strike. *City of Cleveland* v. *Division 268 of Amalgamated Ass'n. of Street & Electric Railway & Motor Coach Employees of America*, 90 North Eastern 2d 711 (Court of Common Pleas of Ohio, Cuyahoga County).

"Mere inadequacy of an award is not sufficient ground for setting it aside, but in particular cases, it may be so gross as to evidence or to establish fraud or corruption or partiality or malfeasance or misfeasance," said the court in its Syllabus. In the instant case, the award was for $1,137.25, although it was stipulated that the repair cost $1,877.27. "The award being 60.5% of the loss, and no evidence of any kind [having been] submitted to the court except [for] the two figures above, *held* that the award was not so inadequate as to compel vacation." Moreover, a finding by the arbitrators appointed to assess the loss, to the effect that the loss was not covered by the insurance policy, was not within their jurisdiction and hence was "mere surplusage" and not final. *Mork* v. *Eureka-Security Fire & Marine Ins. Co.*, 42 North Western 2d 33 (Supreme Court of Minnesota).

Consent decree could not be asserted as res judicata in an anti-trust suit against motion picture producers who allegedly conspired to maintain a system of clearances between runs of motion pictures, which system operated in favor of theaters under their ownership or control. The consent decree had set up a "rule of thumb" by which the Motion Picture Arbitration Tribunal was to determine the reasonableness of a given clearance, and had limited the Tribunal's jurisdiction to issues of clearance. Intervening decisions, however, had so interpreted the law as to render the rule of thumb inapplicable under the Sherman Anti-Trust Act. Moreover, a contract granting clearances was a mere license, personal to the parties, subject to change at their will, and an open matter for negotiation. Therefore, it could not fix permanently the status of any theater so as to bind subsequent owners. Since a prior decision of a court or arbitral tribunal is res judicata only as against the parties who had participated in the proceeding or their privies, the subsequent owners were not barred from pursuing remedies afforded them for vio-

lations of anti-trust laws. *Mission Theatres, Inc.* v. *Twentieth Century-Fox Film Corporation,* 88 F. Supp. 681 (U. S. District Court, W.D., Missouri).

Decision on question of fact by officer empowered by contract to decide was held final "in the absence of fraud or of mistake so gross as to necessarily imply bad faith." The officer admitted having failed to consider prefabrication costs in his computation of the additional expense caused by the Government's delay in furnishing material required by appellants to complete installations contracted for. It had cost $5,270 to install 502 items. According to the officer's decision, the remaining 812 comparable items would have cost $1,835 to install. The court termed this "inconceivable" but pointed out that although the appellants contended that the actual cost of the entire job would be $13,047, they had originally estimated the cost at $7,105, the difference arising because of the delay. Moreover, as a result of appellants' failure to introduce the cost of the prefabrication, (1) "we cannot hold that it is such an amount as indicates a mistake so gross as to warrant an inference of fraud," and (2) "the appellants have not maintained their burden of proof as to the amount of damages they should recover, even assuming fraud." *Lindsay* v. *United States,* 181 F. 2d 582 (Court of Appeals, 9th Circuit).

"A claim of perjury by a defeated person should be scrutinized most carefully," said the court, because "an arbitration award should be viewed more or less in the nature of a judgment and certainly should not be set aside lightly." Since there had been no record made of the testimony, the court found only allegations of fraud, perjury and conspiracy on the one side and denials on the other. In view of the paucity of probative evidence, the court felt "quite convinced that respondent being dissatisfied with the award" was merely attempting "to have a new trial of the issues." *Karppinen* v. *The Karl Kiefer Machine Co.,* U.S. District Court, S.D. N.Y., Civ. 55-207, May 4, 1950.

Arbitrators' award ousting themselves of jurisdiction was held final. Accordingly, an application was denied for an order directing the arbitration board to hear three grievances in a single proceeding since the board had decided that only one grievance could properly be considered at a time. The procedure outlined in sec. 1450 Civil Practice Act, to obtain an order directing arbitration, "is designed to afford a remedy against a party who has refused to proceed with arbitration. Its purpose is to direct a party to appear and submit, but it is not the purpose of such a proceeding to coerce the action of [the] board nor prescribe the manner of conducting its proceedings." *United Electrical, Radio and Machine Workers of America, Local 312* v. *Durez Plastics & Chemicals, Inc.,* Supreme Court of the State of New York, Niagara County, May 26, 1950.

Recovery in exchange rate prevailing on date contract was breached was held properly awarded by arbitrators in a dispute arising out of an obligation which existed under foreign law (India), since the contract was to be performed in this country. On the other hand, if the jurisdiction had arisen

merely from the fact that the creditor happened to "catch his debtor" here, the judgment or award would have been adjusted according to the exchange rate prevailing upon the day rendered. The question arose as to which exchange rate governed because "an arbitration award in this country, like the decision of a court, must direct payment in dollars, since 'the judgment must be rendered in the money of the forum' (*Metcalf Co., Ltd.* v. *Mayer,* 213 App. Div. 607, 613)." Regarding such questions as the date of default, the exchange rate on that date, etc., the court declared: "The arbitrators are deemed to have considered all of these matters and found them in favor of respondent, nor is their award to be disturbed by reason of possible errors of law or fact, inasmuch as an arbitrable dispute existed which was in their province to determine." *United Shellac Corporation* v. *A.M. Jordan, Limited,* 277 App. Div. 147, 97 N.Y.S. 2d 817.

Judgment confirming an award entitling plaintiff to 9% of the profits of a joint venture could be asserted by the defendant in a court action for an accounting. *Silberfeld* v. *Swiss Bank Corporation,* 277 App. Div. 876, 97 N.Y.S. 2d 588.

Three-month time limit for vacating fair rental arbitration award was held applicable also to a plenary suit to vacate the arbitration award fixing the rental; thus a collateral attack upon the award is subject to the same time limitation as a direct attack. *Feinberg* v. *Barry Equity Corp.,* 277 App. Div. 762, 97 N.Y.S. 2d 570.

Contradiction of express provision in agreement defeated an award. The agreement provided that arbitrators' fees and expenses were to be borne by the unsuccessful party. Therefore, the arbitrators had no power to apportion such fees among the parties, and the award was modified to comply with the agreement. *Shapiro* v. *Gordon,* 197 Misc. 241, 97 N.Y.S. 2d 644, aff'd (with modification) 98 N.Y.S. 2d 451.

A conference on arbitration and conciliation——————— will be held at the College of Law, University of Cincinnati, on December 2, 1950. J. Noble Braden, Tribunal Vice President of the American Arbitration Association, will lead the discussion on commercial arbitration; Professor Harry Shulman will deal with labor arbitration; and Peter Seitz, General Counsel of the Federal Mediation and Conciliation Service, will discuss the Government's role in labor disputes. Many of the commercial and labor arbitrators in the Cincinnati area and representatives of local unions and industries are expected to attend. The Winter issue of the *Journal* will bring a report of the proceedings.

Publications

"Review of Labor Arbitration Awards on Jurisdictional Grounds," Eugene F. Scoles, 17 University of Chicago Law Review 616 (1950). The first point in this informative, well-annotated article concerns the arbitrability of jurisdictional questions. Despite many court decisions holding that the arbitrator may not define his own jurisdiction, the author contends that since "the basic premise of arbitration [is] consent to be bound by the award . . . there is no reason why the parties . . . cannot submit to the arbitrator all disputes concerning the meaning and scope of the arbitration clause as well as the meaning of . . . any other provision of the contract. . . . The question for the court . . . [is] whether the parties have by any act agreed to be bound by the arbitrator's decision on the question of arbitrability."

Next, the author refers to clauses which define disputes subject to arbitration and recite that the arbirator is to make no ruling conflicting with, adding to or modifying the agreement. Is such restriction subject to interpretation by the courts or by the arbitrator? Although whether this is a jurisdictional matter is debatable, judges should bear in mind the desire of parties to labor disputes to stay out of the courts, and should therefore consider the parties' intention to leave such construction to the arbitrator. This interpretation of the submission "is within the principle that the parties may submit questions of arbitrability if they so desire."

The author cautions against the growing danger of courts looking into the merits of a dispute under the guise of determining jurisdiction. Although it is often difficult to distinguish between the scope of submission review required by due process and the less desirable practice of using it as a means of reviewing the merits, judicial review of the merits would defeat a major advantage of arbitration—adjudication by experienced persons familiar with the problems of the industry—and should be avoided.

"A prejudicial delay [in rendering an award] should not be tolerated and yet an insignificant one should not destroy the time and effort invested in the settlement of a dispute." However, time limits upon steps in the grievance procedure should be adhered to since they help promote healthy labor relations via speedy settlements. As both types of time limits are a matter of agreement between the parties, "it does not seem jurisdictional in the normal sense of that term. Still it appears to go to arbitrabilit·· and should be considered along with other arbitrability questions."

Regarding partial or fractional awards: "Where the questions are in fact interdependent, a partial award will not be sustained. Conversely where the issues are not in fact interdependent, a partial award will be enforced. Hence, the validity of a partial award appears to turn upon the test of separability."

Basic Patterns in Collective Bargaining Contracts. Reprinted from the "Trends in Bargaining" section of the Bureau of National Affairs' complete

Collective Bargaining Negotiations and Contracts service, this useful and informative pamphlet discusses, in the following major categories, ways in which differences in grievance practices arise. These are some of the highlights: (a) About ⅓ of the union agreements which establish rules for the initiation of grievances allow either the employee or his steward to take the first step; about ½ permit the employee to do so although he may request his steward to represent him; ⅕ require initiation by the steward; and 15% declare that the employee may present and adjust a grievance without participation by the union, although under the Taft-Hartley Law union representatives may be present. (b) Time limits are set forth in four out of ten contracts. (c) About 60% of the contracts require that complaints be in writing. (d) In manufacturing, grievance procedures generally consist of three or four steps excluding arbitration. In non-manufacturing, the conventional number is two. (e) Certain matters—especially wage questions—are expressly excluded from arbitration in about 20% of the contracts. In others, arbitration is restricted to disputes over interpretation or application. Still others, reflecting "concern over a long-standing problem: whether arbitration should be a judicial or nonjudicial procedure," define the approach to be used and the specific area of the arbitrator's authority. (f) Four out of ten agreements call for payment to employees who participate in the processing of grievances. (g) More than 80% of the contracts provide for arbitration. For a description of the arbitration provisions, based on a U.S. Department of Labor survey, see *Arbitration Journal*, N.S., Vol. 5, p. 23 (1950). (Washington, D.C.: Bureau of National Affairs, Inc., 1950, 80 pp. $2.00.)

"The Enforcement of Labor Agreements," Charles O. Gregory and Richard M. Orlikoff, 17 University of Chicago Law Review 233 (1950). The authors analyze the state arbitration statutes, calling them in the main outmoded. Those which merely provide arbitration facilities are undesirable because the parties "will almost always be prejudiced against using the state arbitration machinery." As proof of this they cite reports of strike settlements during 1938-42, showing that conciliation was acceptable where government officials aided in the negotiations, but that the parties were more willing to submit disputes to arbitration when private persons or boards were used.

Compulsory arbitration, they say, "is now politically impossible. Even if . . . generally imposed by legislation, the existing structure of labor relations as we now know it would crumble away. For our present social structure is not geared to absorb the frictions that would be generated by depriving labor and management of their recourse to economic self-help."

A court's refusal to enforce arbitrations of nonjusticiable disputes—a product largely of industrial relations—is "tantamount to decreeing industrial strife." Since such disputes—over union recognition, new wage provisions, union security, etc.—are almost inevitable in America, and since a fundamental tenet of our jurisprudence is the sanctity of contract, parties should be compelled to honor their voluntary commitments regarding them.

The authors conclude the analysis of state laws with a plea for uniformity of control "if any sort of reliability is to be injected into the fields of labor arbitration." Such uniformity could be achieved, they suggest, by retaining

the Federal Act with amendments to make it clearly applicable to collective bargaining agreements.

"The Duty to Bargain Collectively During the Term of an Existing Agreement," Archibald Cox and John T. Dunlop, 63 Harvard Law Review 1097 (1950). In seeking "to emphasize the gap . . . between the needs and practices of voluntary collective bargaining and the doctrines being developed by the NLRB in interpreting the phrase 'to bargain collectively'," the authors contend that "it is unlikely that the NLRB will contribute much to the practices of voluntary bargaining" until it alters its interpretation of applicable statutory provisions. They declare that arbitration policy dictates that "so long as the arbitrator moves within the orbit of 'administration,' the parties will submit their disputes with the assurance that the arbitrator will not remake their basic relationship; they will also accept his awards the more readily. By the same token the arbitrator has points of reference to guide him in making his decisions only so long as he refrains from establishing basic, new conditions of employment. . . . [He] should preserve the practices, substantive and procedural, existing at the time the contract was signed and remit to the next contract negotiations whichever party is seeking a change."

"Some Confusing Matters Relating to Arbitration in Washington," Wesley A. Sturges and William W. Sturges, 25 Washington Law Review 16 (1950). Generally, the Washington Arbitration Statute of 1943 makes agreements to arbitrate existing or future justiciable controversies enforceable, and does not expressly outlaw the privilege of electing to arbitrate outside the Statute under common law. It would thus seem that if parties enter into an agreement which does not meet Statutory requirements, or if they stipulate in an agreement which otherwise complies with the Statute that it shall not apply, the agreement, proceedings and award should be valid under common law. Washington courts have held that during the life of a prior arbitration law the common law was supplanted and that this result applies also to the present statute. The authors point out, however, that the courts have recognized arbitration as a voluntary process predicated upon contractual relations of the parties and, since the Statute does not expressly outlaw common law arbitration, the courts could not deprive the parties of their freedom of contract. Furthermore, judicial declarations which seemed to support that holding have been expressed in dicta, and therefore are not binding.

The authors also consider case law relative to enforcing agreements to arbitrate labor disputes under the Statute. Granting uncertainty of construction, they believe the Statute contemplated such agreements becoming "valid, enforceable and irrevocable."

"The Constitutionality of Compulsory Arbitration," Bernard Schwartz, 38 Kentucky Law Journal 361 (1950). "Schemes for compulsory arbitration," says the author, "amount to more than mere restrictions upon labor unions. In effect, they constitute an attempt by the state to remove industrial relations from the arena of 'self-help' and to subject them to settlement by legal processes." Carefully excluding from the scope of his paper the question as to

whether such schemes are desirable, he considers the following Constitutional limitations which he believes might be applied to compulsory arbitration statutes: 1) those imposed by the provisions of the 5th and 14th Amendments as to due process of law; and 2) those imposed by the 13th Amendment regarding involuntary servitude. He discusses the grounds upon which Constitutional attacks might be levied from the point of view of both employer and employee and, on the basis of federal and state court decisions, concludes that "statutes providing for compulsory arbitration could successfully meet the Constitutional test."

"The Handling of Emergency Disputes," Thomas Kennedy, *Proceedings of the Second Annual Meeting,* Industrial Relations Research Association, December 29-30, 1949. Six major problems have arisen from the attempt to deal with emergency labor disputes by state seizure and compulsory arbitration: 1) definition of an emergency, 2) effect on collective bargaining, 3) influence of politics, 4) inadequacy of sanctions, 5) lack of acceptable wage criteria, and 6) relationship between compulsory arbitration boards and the Public Utility Commission. Confining his discussion to New Jersey's experience, the author analyzes various utility industries and concludes that the emergency nature of such strikes has been overestimated. Referring to the relationships between specific unions and New Jersey utility companies before and after compulsory arbitration was instituted, he indicates that the process has had a "crippling effect on collective bargaining."

Labor Relations Law, Marcus Manoff. Another in a series of basic legal texts published by the Committee on Continuing Legal Education of the American Law Institute in collaboration with the American Bar Association, this is an easy-to-use summary of labor relations law geared to the average general practitioner, covering substantive aspects, procedure and some of the practical problems. Included is a chapter on arbitration which, although necessarily brief because of the brevity of the entire booklet, nevertheless contains some references to leading cases on the subject. (Philadelphia: Committee on Continuing Legal Education of the American Law Institute, 1950, 140 pp., $2.)

"Interstate Arbitration of Death Taxes," Robert H. Anderson, 30 Boston Law Review 396 (1950). After disposing of the various methods essayed as inadequate to protect a decedent's estate against multiple taxation based upon conflicting claims as to the decedent's domicil at the time of death, the author discusses the Uniform Acts dealing with interstate arbitration of death taxes, whereunder the taxing officials of one state claiming domicil are authorized to enter into a written agreement with the taxing officials of another and the decedent's representatives, to submit to arbitration the question of domicil. The state upheld then receives the full amount of its claim, there being no apportionment allowed, and such decision is regarded as final for death tax purposes only.

The author argues that the effect of a not-infrequent determination of domicil made on the basis of the various factors involved but contrary to the expressed intent of the decedent during his lifetime could be "ameliorated

by provisions in the arbitration acts empowering the board to apportion the death tax between the two states if both have a valid claim of domicil." He does not propose a rigid formula, but rather that the arbitrators be permitted to decide. He also discusses whether apportionment would violate the maxim that one person can have only one domicil at a time, and refers to the theory that state inheritance taxes are "imposed for the privilege of devolution of property." Since intangibles do not have a situs but admittedly should be taxed somewhere, it is "convenient" to designate the state of domicil as the taxing power. However, unless it appears that the state of domicil "conferred such benefits on the decedent and his property that it would be fair to permit that state to tax exclusively, such designation is without reason and unjustifiable." If apportionment seems unacceptable because of its implication that one man may have more than one domicil, "we may substitute 'benefit-conferring' state for 'domicil'" for the purpose of death taxes and make an apportionment accordingly.

"Stockholders' Agreements in the Closely Held Corporation," George D. Hornstein, 60 Yale Law Journal 1040 (1950). This excellent article deals also with the procedure for arbitrating disputes arising out of such agreements and with some recent court decisions recognizing arbitration as the appropriate means of settlement. Here are some of the author's thoughts:

> "The category of illegal contracts, the writer predicts, will be narrowed with the passage of time, whereas the matter to be arbitrated will be widened as more agreements employ a standard form. Until the law with respect to arbitration is better settled some other neat questions may come up. For example, one loses his right under an arbitration agreement by proceeding to suit. Query then whether he can ask for arbitration if he has first sued and the court rules that he was bound to arbitrate?
>
> "Lawyers still perform a service in the arbitrative process. The Rules of the American Arbitration Association, the organization usually employed, expressly provide that parties may be represented by counsel. Statistics show that lawyers represent clients in 82% of the commercial matters submitted to arbitration. The great advantage of arbitration is that it speeds up decision once a controversy has materialized."

Custom House Guide, 1950 Edition, John Budd, Editor. In its 88th year of publication, the *Guide* is recognized as the "bible" of international traders, and remains the only publication in the world which offers under one cover all the latest rates of duty in accordance with all acts of Congress, trade agreements and the like. A monthly supplement, the *American Import and Export Bulletin,* keeps the *Guide* current by covering the latest laws, regulations, decisions, ruling, import and export control requirements, trade pacts, general news and business contact lists, and a free Readers Information Service is maintained for the benefit of subscribers. The *Guide* and its supplement are "musts" for persons and organizations interested in the specifics of world trade. (New York: Custom House Guide, 1950, 1600 pp., $25 plus postage includes monthly *Bulletin.*)

"Inter-American Commercial Arbitration," Martin Domke, 4 **Miami Law** Quarterly 425 (1950). This article traces in its many references the development of inter-American trade arbitration both by business interests and the governments themselves. The basis for the present Inter-American Commercial Arbitration System was laid at the Seventh International Conference of American States, following which the Pan-American Union authorized the American Arbitration Association and the Council on Inter-American Relations (which was dissolved in 1936) to proceed with the organization of a system of arbitration independent of official control and representing the commercial and not the political interests of the American Republics. In 1934, the Inter-American Commercial Arbitration Commission was founded, and, with the cooperation of commercial groups in each country, it set up national committees and established panels of arbitrators.

Disputes submitted most frequently to the IACAC include those arising out of failure to ship or deliver commodities, delay in delivery and payment, failure of merchandise to accord with specifications, changes in terms of contract, interpretation of agency agreements and shipping terms, damage to merchandise in transit, partnership or other joint venture questions, and claims of principals against agents and vice versa.

"The development of commercial arbitration, especially in its international aspects of foreign trade," says the author, "is only possible under standard clauses and standard procedures . . . [and] a certain uniformity of basic provisions in the statutory arbitration law of the various Latin-American countries becomes indispensable." Accordingly, the Sixth International Conference of American States recommended that the American Republics enact into their respective laws standards for the enforcement of arbitration agreements and awards. Trade associations were given primary responsibility for obtaining members' compliance with agreements and awards pending such enactment. And lawyers' associations, among them the Inter-American Bar Association, adopted resolutions and recommendations implementing these proposals.

The author concludes that "extensive use of commercial arbitration in the Latin-American countries cannot, however, be obtained by the improvement alone of statutory Laws," but that it will be necessary to make more use of existing facilities and machinery for arbitration.

"Some Aspects of Industrial Relations in Denmark," Walter Galenson, *Proceedings of the Second Annual Meeting,* Industrial Relations Research Association, December 29-30, 1949. The author presents an interesting study of methods of dealing with industrial relations disputes over interests. Negotiations are begun by suborganizations of the Danish Federation of Labor and the Danish Employers' Association—cohesive, delegated groups without competitors— on December 1st. If there are agreements outstanding by February 15th and either party has given notice of intent to effectuate a work stoppage, final negotiations are begun under the auspices of a government mediator. Although as a condition of intervention the latter may require postponement of the stoppage for one week only, in practice the parties generally agree to both mediation and postponement.

The Danish mediator comes to the proceeding armed with the facts and by

the time the agenda is drawn he usually has a draft agreement worked out. The proceeding then commences as a cross between arbitration and bargaining.

If the mediation proposal is rejected, the Government intervenes and the proposal is enacted into law. The effect has been the same even when an arbitration board was appointed, for such board has generally followed the mediation proposal in all important aspects. "Previously, the sole end of mediation had been reconciliation of the parties, without regard to the impact of the agreement upon the nation's economy. But with the growing possibility that the mediation proposal, if not accepted voluntarily, would become an act of parliament, it lost its exclusively private character and was transformed into an expression of public policy."

The author then proceeds to discuss how the Danish system "departs" from compulsory arbitration. For example, he mentions that there are still situations in which the mediator withholds a mediation proposal, as occurred in 1946, when a strike of 40,000 workers resulted. Furthermore, it is not *certain* that the government will intervene even though a proposal is rejected. And if it should, the form which the intervention might take is likewise not certain. Finally, he points out that the Danish method of government intervention is *ad hoc*, thus avoiding the pitfall of permanent compulsory arbitration of developing a body of rigidly-applied precedents. Although it is difficult to draw conclusions regarding the degree to which the Danish system "departs" from compulsory arbitration as it has become known in the United States on the basis of facts presented within the necessary confines of a twelve-page paper, it appears somewhat questionable, despite the refinements of the Danish system, that it "departs" to a very great extent.

"Arbitration — Proving Your Case"

is a new course to be offered this Fall by the New York University Management Institute. It will be conducted by Jules J. Justin, well-known labor arbitrator and member of the New York Bar. Following upon the ' naginative course offered by Mr. Justin this past Spring, which dealt with negotiating contract clauses from the standpoint of the impact arbitration would have upon them, this new course will provide specialized training and practice in the techniques of labor arbitration, with emphasis upon preparation and presentation of cases, and analyses of principles and criteria governing the arbitral process. Through the cooperation of the American Arbitration Association, all sessions will be held at its central office, 9 Rockefeller Plaza, New York, N. Y.